NO. 2719

United States Circuit Court of Appeals,

Ninth Circuit

SANTA CRUZ DEVELOPMENT COMPANY,
Appellant,

against

CORNELIUS C. WATTS, et al.,
Appellees.

Brief in behalf of Santa Cruz Development Company, Appellant.

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Counsel for Santa Cruz Development Company, Appellant.

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BRIEF IN BEHALF OF SANTA CRUZ DEVELOPMENT COMPANY, APPELLANT

Statement of Case.

Nature of the Action

This is an appeal by Santa Cruz Development Company, one of the defendants below, from a decree of the United States District Court for the District of Arizona, in an action brought by Messrs. Watts and Davis as plaintiffs to quiet title to a tract of approximately 100,000 acres of land in Santa Cruz (formerly Pima) County, Arizona, and now known as Baca Float or Location No. 3.

The name Baca *Float* is inaccurate and of recent coinage. The grant was a "float" until proper selections were made; then the selections became "locations."

The chief controversy herein arises because Messrs. Watts and Davis and the defendants Bouldin claim title to the tract under a chain of deeds, beginning with the deed from Watts to Hawley (P. R. 193), which describe by proper metes and bounds an entirely different tract.

The plaintiffs expressly disavowed any desire to have any instrument reformed (P. R. 186). They stand upon their deeds; but ask the Court to disregard the metes and bounds therein of another tract, so that the deeds may cover the land involved herein.

The various defendants filed answers in the nature of cross bills setting up their respective chains of title, and prayed for the quieting thereof (See stipulation, P. R. 119).

Act of Congress

By the sixth section of the Act of June 21, 1860 (12 Stat. L. 71), Congress enacted:

> "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the Town of Las Vegas to select instead of the land claimed by them an equal quantity of vacant land, not mineral in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land

so selected by the said heirs of Baca when thereunto required by them, provided, however, that the right hereby granted shall continue in force for three years from the passage of this act, and no longer."

1863 Location

In pursuance of this statute John S. Watts, on June 17, 1863, as attorney for the Baca heirs, selected and located, as Location No. 3 of the Baca series, the tract of land in controversy herein and known as the 1863 tract (P. R. 174).

Title to this tract passed from the United States to the heirs of Baca on April 9, 1864, on the approval of the location by the Commissioner of the General Land Office and his order that it be surveyed (*Lane v. Watts,* 234 U. S. 525; 235 U. S. 17).

The 1863 tract begins at a point one and one-half miles from the base of the Salero Mountain, in a direction north 45 degrees east of the highest point of said mountain; and running thence from said beginning point west, south, east and north, each course being twelve miles thirty-six chains and forty-four links.

On May 1st, 1864, this tract of land was conveyed to John S. Watts by most of the Baca heirs in a full covenant warranty deed (P. R. 154, 165). On May 30, 1871, the other heirs, as we contend, conveyed to John S. Watts (P. R. 197).

There is a contention by two of the parties herein, Joseph E. Wise and Margaret W. Wise, that Antonio

Baca or Jose Antonio Baca was also an heir and entitled to a one-nineteenth interest in said land, and that he did not convey to John S. Watts, but that they acquired title from his heirs. This phase of the case is discussed in a brief in which we join with the plaintiffs and the defendants Bouldin.

1866 Location

On April 30, 1866, John S. Watts, as attorney for the Baca heirs, applied to the Commissioner of the General Land Office for permission to change the initial point of the location made in 1863, so as to begin three miles west by south of the building known as the "Hacienda de Santa Rita" and running thence north, east, south and west twelve miles, thirty-six chains and forty-four links in each course to the place of beginning (P. R. 176). This we shall call hereafter the 1866 tract. As will be seen by reference to the map herein, the 1866 tract is an entirely different tract from the 1863 tract, although slightly overlapping it.

On May 21, 1866, the Commissioner approved the 1866 location and ordered a survey thereof,

> "provided by so doing the out-boundaries of the grant thus surveyed will embrace vacant land not mineral" (P. R. 177).

Status of two locations in 1870

By applying for the 1866 tract and receiving a conditional approval thereof, John S. Watts impliedly con-

sented that on receiving a valid approval, the Commissioner's letter and order of April 9, 1864, which passed title to the 1863 location, should be deemed vacated and withdrawn and title to the 1863 tract revested in the United States.

As the grant of the 1866 tract was subject to the condition precedent of a satisfactory explorative survey, the title of John S. Watts to the 1863 tract became subject to defeasance on the valid absolute approval of the 1866 tract. A purchaser of the 1866 tract would not get absolute title to it until the valid performance of the condition precedent attached thereto. On the due performance of that condition, the United States would be revested of its title to the 1863 tract and divested of its title to the 1866 tract.

In 1870 and until the disposal of the condition in the grant of the 1866 tract, John S. Watts had an absolute title to the 1863 tract, subject to defeasance as above stated, and a conditional title to the 1866 tract.

Locality of Tracts

The 1866 tract is located within the Santa Rita Mountains and no part of the 1863 tract, except the overlap, lies therein. In the overlap of the two tracts (approximately 5,000 acres) and near Salero Mountain lie the foothills of the Santa Rita Mountains. These mountains run northwesterly and southeasterly from the highest peak therein known as "Mount Wrightson" or "Old Baldy." This is shown by the topography and the direction of the streams appearing on the map herein.

The 1863 tract comprises mostly land in the valley of the Santa Cruz River and grazing land contiguous thereto. The 1866 tract is mountainous mineral land.

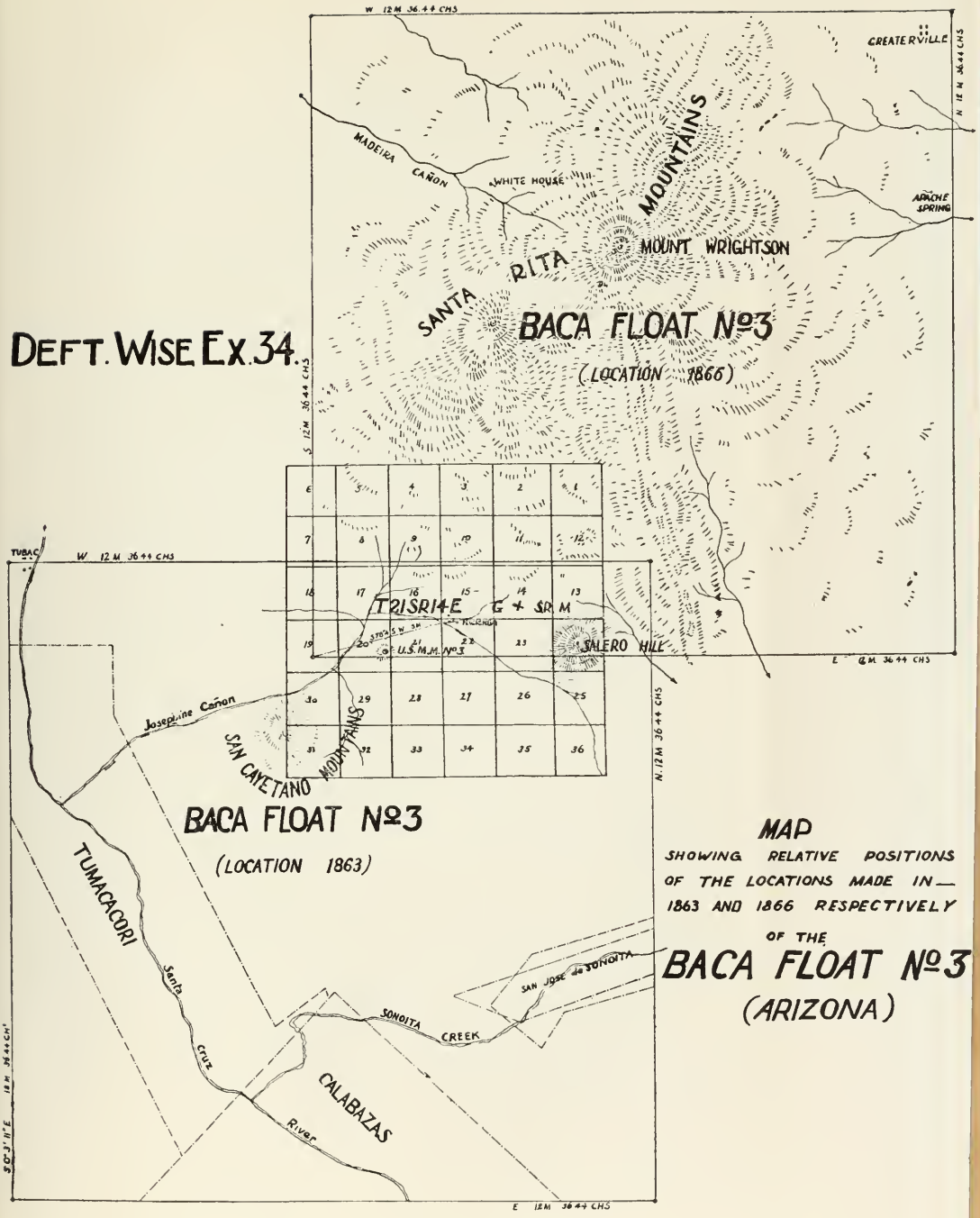
In 1870, practically all of the land in the 1863 tract of any value whatsoever was claimed adversely under a Mexican grant called the "Tumacacori and Calabasas grant"; and there was also a claim made for the San Jose de Sonoita grant. In 1899, the Tumacacori and Calabasas grant and a large part of the Sonoita grant were declared invalid by the United States Supreme Court.

Testimony as to 1866 Tract

The witness Magee came to Arizona in December, 1874, in behalf of a mining company to take charge of the 1866 tract and to have it surveyed, and remained on the tract for fifteen years. Hawley arrived shortly thereafter and Magee pointed out the 1866 tract to him. As Hawley gave Mr. Magee a power of attorney, the relations between Hawley and the company were friendly and mutual. Mr. Magee requested the Surveyor General of Arizona to execute the survey of the 1866 tract, ordered by the Commissioner of the General Land Office on May 21, 1866, but the Surveyor General refused to make the survey, stating he knew that the entire 1866 tract was notoriously mineral land to which no absolute title could pass under the Commissioner's order. Mr. Magee testified that he had nothing to do whatever with the 1863 tract (See Magee testimony, P. R. 249 to 255).

The testimony also shows that Hacienda de Santa Rita, the monument of the 1866 tract, was and is a well known

DEFT. WISE EX. 34.



MAP
SHOWING RELATIVE POSITIONS
OF THE LOCATIONS MADE IN—
1863 AND 1866 RESPECTIVELY
OF THE
BACA FLOAT Nº3
(ARIZONA)

building; and that the 1866 tract was surveyed in 1887 under the direction of Mr. Bouldin, then associated with the Hawley title claimants. Mr. Bouldin placed many monuments on the exterior lines and spectacularly took possession of the 1866 tract.

Subsequent History of the 1866 Tract

In 1885, John C. Robinson, who had received a conveyance from Hawley, applied to the Commissioner of the General Land Office for leave to select another tract in lieu of the 1866 tract, stating that the latter tract was mineral land and therefore the grant in the Commissioner's letter of May 21, 1866, could never operate (P. R. 180). This application was allowed by Commissioner Harrison; but in 1887 Secretary Lamar overruled the Commissioner in so far as a relocation was allowed (P. R. 182).

In 1893, Mr. Cameron, who then held the Hawley title, applied to the Surveyor General of Arizona for a survey of the 1866 tract (P. R. 327). The application was denied for the stated reason that the land in question was mineral land.

On July 25, 1899, the Secretary of the Interior (29 L. D. 44), on an application for the survey of the 1866 tract, decided that the 1866 location was invalid, as it was not an amendment of the location of 1863 but substantially a new location made after the three year period.

In 1901, Alex F. Mathews, who then held at least one-half of the Hawley title, applied to the Secretary of the

Interior for a reversal of the decision of July 25, 1899, and asked to be allowed to keep the 1866 tract, alleging *inter alia* that, with the acquiescence of the Government, it had passed from grantee to grantee for large considerations as Baca Float No. 3 (P. R. 396). The prayer for reversal was not granted.

Subsequent History of 1863 Tract

At no time since its location has the legal existence of the 1863 tract as a location been disregarded. After the conflicting Mexican grants were declared invalid in 1899, it became valuable commercially. Only since the entry in 1906 or 1907 of Messrs. Watts and Davis (both lawyers) have the Hawley title claimants sought the 1863 tract.

On June 23, 1914, appeared the opinion of the United States Supreme Court in the case of *Lane v. Watts,* 234 U. S. 525 (see also 235 U. S. 17), holding that the legal title to the 1863 tract passed from the United States to the Baca heirs on April 9, 1864. The Court affirmed the decree of the Supreme Court of the District of Columbia, which directed the Commissioner of the Land Office and the Secretary of the Interior to file the official plat of survey as a muniment of title, and also enjoined them from treating the land as public land.

The chain of title under the Hawley deed was offered in evidence in *Lane v. Watts,* and also the chain of title under which Santa Cruz Development Company claims. None of the questions herein was involved or passed upon in that case.

Hawley Deed

On January 8, 1870, John S. Watts executed a quit-claim deed in favor of Christopher E. Hawley (P. R. 193) for a tract of land in the Santa Rita Mountains, recited to have been granted by the United States to the Baca heirs and by said heirs conveyed to the grantor by deed dated May 1, 1864, bounded and described by the metes and bounds of the 1866 tract, "said tract of land being *known as* Location No. 3 of the Baca series." This deed was not recorded until 1885. Most of the difficulties in this case arise through the conflicting contentions as to the construction of that deed.

Messrs. Watts and Davis and the Bouldins claim that the deed conveyed on its face and was intended to convey the 1863 tract, as Location No. 3 of the Baca series, although the 1866 tract alone was described therein by metes and bounds, had been granted to the Baca heirs on May 21, 1866 and was in fact then "known as Location No. 3 of the Baca series."

Assertions of Title by Watts Heirs

As before stated, John S. Watts on May 30, 1871, over a year after the Hawley deed, took a deed from other Baca heirs for Location No. 5, and also for a confirmance of the title to him of the 1863 tract (P. R. 197).

In 1877, shortly after his father's death, J. H. Watts, son of John S. Watts, asserted ownership in a letter to the Commissioner of the Land Office (P. R. 178).

In 1884, the Watts heirs still claimed ownership and tried to have their title cleared of conflicting titles and grants (P. R 272).

In 1899, their title was conveyed to John Watts.

In 1913, John Watts conveyed to James W. Vroom, who conveyed to Santa Cruz Development Company.

Instrument of September 30, 1884

The defendants Joseph E. Wise, Ireland intervenors and possibly the Bouldins also, claim that a paper executed by John Watts on September 30, 1884, in his own name and by assuming to act as attorney-in-fact for the other heirs of his father, John S. Watts, is an absolute conveyance of a two-thirds interest (P. R. 272). This point becomes material if this Court holds that the Hawley deed did not convey all of the 1863 tract.

Santa Cruz Development Company contends that the paper on its face is only an executory contract which was never performed; that if it be treated as a conveyance, there was no authority in John Watts to execute it for his mother, brother and sisters; and that if a conveyance, it is "absolutely null and void" under United States R. S. 3477, even between the parties, because of its subject matter and its failure to comply with the statutory formalities of execution.

No attempt was made at the trial by any of our opponents to prove any performance of the contract.

Testimony of John Watts

John Watts, whose deposition was taken in behalf of the defendant Joseph E. Wise and is uncontradicted,

testified that both he and Mr. Bouldin always considered the paper a contract or agreement and spoke of it as such (P. R. 301, 305, 308); that Bouldin came to him seeking employment on a contingent retainer basis (P. R. 302, 300); that they had no previous dealings (P. R. 301); and that he had never heard of any claim being made that the paper was a conveyance until counsel for the Santa Cruz Development Company informed him thereof the night before the deposition was taken (P. R. 305, 308).

John Watts testified that he had some form of authority from the other heirs to sign the paper in their behalf, but he could not say whether the instruments of authority were acknowledged as required by the Arizona statute (P. R. 287, 302). He also stated that he had no authority to execute an absolute conveyance (P. R. 301) and that he never told the heirs that he had executed anything but a contingent retainer contract (P. R. 304).

Indicia of Executory Contract

The paper has all the *indicia* of an executory contract. It was signed by Mr. Bouldin and by John Watts individually and as attorney in fact for the other heirs. Although executed in Santa Fe or El Paso where an officer could readily be found to take acknowledgments, it was not acknowledged by either party. It was first recorded as executed and subsequently re-recorded on a belated proof by a subscribing witness. Its character as an executory contract with power of attorney is also evident from the reading of the paper as a whole; its words of

conveyance are expressly predicated upon the performance of Mr. Bouldin's covenants, and the ultimate subject matter of division between the parties was of whatever Mr. Bouldin might secure for the Watts heirs.

Abandonment of Contract

Mr. Bouldin did nothing whatsoever under the paper. In 1885 he allied himself with Mr. Robinson, the claimant under the Hawley deed, and received some of Mr. Robinson's rights thereunder, and acted with and for him thereafter in respect to the 1866 tract. Mr. Bouldin promptly conveyed to his sons all he acquired from Mr. Robinson in the 1866 tract, and then made partitions thereof for them with Mr. Robinson.

Filing of Bill

On June 23, 1914, the day following the announcement of the first decision of the United States Supreme Court, Messrs. Watts and Davis filed their Bill herein. After a number of amendments it developed into the form filed at the opening of the trial in March, 1915.

CONTENTIONS OF PARTIES

Santa Cruz Development Company

Santa Cruz Development Company contends that it is the owner of the entire 1863 tract, except a small part thereof in the northeast corner known as the Alto mining property and which was sold at a tax sale in June, 1914. It bases its claim as follows:

1. That the deed to Hawley passed at most the overlap between the two tracts.
2. That the Bouldin paper of September 30, 1884 is an unperformed executory contract under which no title passed.
3. That the company's title, therefore, from the Watts heirs is clear and valid.
4. That whatever title passed under the Hawley deed is vested in Santa Cruz Development Company under its chain of title through Arizona Copper Estate, as the partitions between Robinson and Bouldin did not affect the 1863 tract as they were clearly of right, title and interest in the 1866 tract.

Watts and Davis

Messrs. Watts and Davis, the plaintiffs below, claimed in their Bill that they were the sole owners of the entire 1863 tract under the Hawley deed. At the trial they abandoned their contentions as to the north half of the tract; and they now claim only the south half of the 1863 tract and recognize the Robinson-Bouldin partitions. The plaintiffs make no claim to the overlap.

Bouldins

The defendants Bouldin in their amended answer claimed the north half under the Robinson-Bouldin partitions and also claimed that the Bouldin paper of September 30, 1884 was an absolute conveyance on its face. In the prayer, they asked only for the north half of the

1863 tract under the Robinson-Bouldin partitions. Their notice of appeal is devoted entirely to the refusal of the court below to give them the whole of the north half. At the trial their counsel announced that he believed the trial court's decision on the Hawley deed to be correct (P. R. 419).

The Bouldins agree with the plaintiffs on the Hawley deed; but they may also attempt to claim alternatively that if the Hawley deed did not pass the 1863 tract, then the Bouldin paper of Sept. 30, 1884 conveyed absolutely a two-thirds interest therein and that this two-thirds interest is in the Bouldin defendants.

Joseph E. Wise and Lucia J. Wise

The defendant Joseph E. Wise agrees with us that the Hawley deed passed title only to the overlap at most. He and the Ireland intervenors join with the Bouldin defendants in contending that the Bouldin paper of Sept. 30, 1884 was an absolute conveyance. Joseph E. Wise also claims that he secured title to the interest of David W. Bouldin under a sheriff's sale proceeding.

The defendants Joseph E. Wise and Lucia J. Wise may also claim title to several small parts of the 1863 tract by adverse possession. At the trial they practically abandoned such claims, recognizing that the statute of limitation as to adverse possession could not commence to run until December 14, 1914, when the plat of survey was filed.

Mr. Wise also claims an undivided one thirty-eighth interest of the whole tract through Antonio Baca, the al-

leged extra or nineteenth heir of Luis Maria Baca, but this is discussed in a separate brief.

Margaret W. Wise

Margaret W. Wise claims only an undivided one thirty-eighth interest through Antonio Baca, the alleged extra or nineteenth heir of Luis Maria Baca.

Ireland Intervenors

The Ireland intervenors claim an undivided one fifty-fourth interest in the 1863 tract as heirs and devisees of John Ireland. In the instrument of 1885 (P. R. 312) Mr. Bouldin conveyed to Messrs. Ireland and King "an undivided one-third of one-third" of all his interest in the 1863 tract, or one-ninth of whatever his interest might have been. The Ireland intervenors claim one-half of John Ireland's one-half of the one-ninth said to have been conveyed by Mr. Bouldin to Ireland and King in his alleged two-thirds interest under the instrument of September 30, 1884; this explains the one fifty-fourth fraction.

CHAINS OF TITLE

Watts and Davis

They claim under the following *quitclaim* deeds:

(a) Numbers 1 and 2 specifically describing the 1866 tract by proper metes and bounds;

(b) Numbers 3 to 8 inclusive specifically describing the southerly half of the 1866 tract by proper metes and bounds and none of them containing the title references found in the Hawley deed;

(c) Only Number 10 containing the metes and bounds of the 1863 tract.

1. John S. Watts to Christopher E. Hawley, dated Jan. 8, 1870 (P. R. 193).
2. Christopher E. Hawley to John C. Robinson, dated May 5, 1884 (P. R. 208).
3. Partitions dated Nov. 12 and 19, 1892, "of right title and interest" between John C. Robinson on the one part, and Powhatan W. and James E. Bouldin on the other part, whereby (as we claim) Mr. Robinson received the south half of the 1866 tract by correct metes and bounds and the Bouldins the north half (P. R. 216).
4. Confirmative deed by Powhatan W. Bouldin and James E. Bouldin to Alex F. Mathews, dated Feb. 7, 1894, reciting that the land conveyed by the preceding deed was described "fully and accurately therein" and that it was the intention of the parties to the preceding deed that Mr. Robinson should have the land "included in the metes and bounds by said (preceding) deed given" (P. R. 229).
5. John C. Robinson to John W. Cameron, dated Dec. 1, 1892, for land conveyed to Mr. Robinson by preceding deed (P. R. 255).
6. Declaration of trust by John W. Cameron, dated Nov. 28, 1892, to the effect that he held the land

conveyed to him by the preceding deed in trust for John C. Robinson, Mrs. A. T. Belknap, James Eldredge, Charles Eldredge and John W. Cameron (P. R. 226).

7. Cameron beneficiaries to Alex F. Mathews, dated September, 1893 (P. R. 210, 220, 223, 226).
8. John Ireland and Wilbur H. King to Alex F. Mathews, dated Feb. 7, 1894, releasing their rights in the southerly half of the 1866 tract because of a deed or executory contract made by David W. Bouldin to them for an interest in the metes and bounds of the 1863 tract (P. R. 219).
9. John C. Robinson to Samuel A. M. Syme, dated April 30, 1896, for the northerly half of the "tract * * * known as Baca Location or Float No. 3" and followed by metes and bounds of the northerly half of the 1866 tract (P. R. 212).
10. Trust indenture by Samuel A. M. Syme, and the devisees and legal representatives of Alex F. Mathews, to Cornelius C. Watts and Dabney C. T. Davis, Jr., "Trustees," dated February 8, 1907, for the 1863 tract. *This is the only instrument in this chain which omits the metes and bounds of the* 1866 *tract and is the only instrument therein containing the metes and bounds of the* 1863 *tract* (P. R. 214).

Bouldins

The defendants Bouldin claim through John C. Robinson as follows:

1. Under deeds 1, 2 and 3 of the Watts and Davis chain, whereby (as we claim) the northerly half

of the 1866 tract was conveyed to Powhatan W. Bouldin and James E. Bouldin, and by deed No. 4 in that chain the metes and bounds of No. 3 were approved and admitted to be accurate.

2. Powhatan W. Bouldin to Dr. M. A. Taylor, dated November 7, 1894 (after the recording of Nos. 3 and 4 of the Watts-Davis chain) specifically describing the entire 1866 tract.
3. Certificate of sale by sheriff of interest of Powhatan W. Bouldin to Lionel M. Jacobs, dated June 15, 1894, and assignment to Dr. M. A. Taylor, dated December 4, 1894, specifically describing both the 1863 and 1866 tracts.
4. Lionel M. Jacobs to Dr. M. A. Taylor, dated December 4, 1894, specifically describing the northerly half of the 1866 tract.
5. James E. Bouldin to Dr. M. A. Taylor, April 25, 1895, specifically describing the north half of the 1866 tract.
6. Dr. M. A. Taylor to Daisee Belle Bouldin, November 28, 1896, specifically describing the north half of the 1866 tract.
7. Daisee Belle Bouldin and James E. Bouldin to D. B. Gracey, April 16, 1900, specifically describing the north half of the 1866 tract, conveying an undivided one-half interest, and leaving an undivided one-half interest in Daisee Belle Bouldin.
8. D. B. Gracey to James E. Bouldin, June 15, 1904, for an undivided one-half interest in a tract specifically described as the north half of the 1866 tract.

9. James E. Bouldin to Jennie N. Bouldin, June 24, 1913, for an undivided one-half of the northerly half of the 1863 tract.
10. Stipulation that the infants defendants David W. Bouldin and Helen Lee Bouldin are the sole heirs at law of Daisee Belle Bouldin, deceased (P. R. 148).

Deeds Nos. 2 to 9 inclusive are substantially in above order (Bouldin Exs. 1 to 8, P. R.).

Alternatively, the defendants Bouldin may also claim a *two-thirds* interest in the 1863 tract under the heirs of John S. Watts, although the Bouldins prayed only for the entire north half under the Robinson chain in their amended answer and expressly limited their notice of appeal to the refusal of the trial court to give them the north half under the Robinson-Bouldin partitions:

1. Instrument of September 30, 1884, to David W. Bouldin, which the Bouldins assert is an absolute conveyance of a two-thirds interest in the 1863 tract, but which we claim is only an executory contract.
2. David W. Bouldin to Powhatan W. Bouldin and James E. Bouldin, dated August 23, 1892, for all of the grantor's "right, title and interest in and to Baca Float No. 3, describing it by the metes and bounds of the" 1866 tract. This deed is not in evidence, but is set out in Section 17 of the Bill.
3. Nos. 3 to 10 inclusive in their Robinson chain. If, however, the Hawley deed did not pass the 1863 tract, these last named deeds certainly are insuf-

ficient to convey the 1863 tract or any part thereof, in so far as the defendants David W. Bouldin and Helen Lee Bouldin are concerned, but leave an interest in the defendants Jennie N. Bouldin and James E. Bouldin.

Santa Cruz Development Company

1. J. Howe Watts et al., heirs of John S. Watts, to John Watts (P. R. 411, 295, 283, 284).
2. John Watts to James W. Vroom (P. R. 412).
3. James W. Vroom to Santa Cruz Development Co. (P. R. 412).

In case the decree in No. 2663 is reversed, Santa Cruz Development Co. will also claim under the Hawley title chain, contending that the Robinson-Bouldin partitions expressly covered only the 1866 tract:

1. Mathews and Syme to The Arizona Copper Estate, dated August 3, 1899 (P. R. 413).
2. The Arizona Copper Estate to A. M. Fowler (P. R. 413).
3. A. M. Fowler to Santa Cruz Development Co. (P. R. 414).

Joseph E. Wise

The defendant Joseph E. Wise claims either a two-thirds or a thirty-five fifty-fourths interest under the heirs of John S. Watts as follows:

1. Instrument of September 30, 1884, which he claims is an absolute conveyance of a *two-thirds interest* in the 1863 tract, but which we contend is only an executory contract.

2. Conveyance by David W. Bouldin to John Ireland and Wilbur H. King of one-ninth of grantor's interest (P. R. 312).

3. Sale of interest of David W. Bouldin by the sheriff of Pima County to Wilbur H. King (P. R. 319). The validity of these proceedings is contested by the defendants Bouldin.

4. Sheriff to Wilbur H. King (P. R. 319).

5. Wilbur H. King to Joseph E. Wise (P. R. 320).

6. Corrective sheriff's deed to Joseph E. Wise (P. R. 323).

7. Mrs. A. M. Ireland to Joseph E. Wise (P. R. 323).

This is exclusive of the claim of title of the defendant Joseph E. Wise to one-half of the one-nineteenth interest which he alleges was in Antonio Baca or Jose Antonio Baca as the son of Luis Maria Baca, deceased, and is independent of the title which he may claim by adverse possession under certain homestead entries.

Ireland Intervenors

They claim an undivided one fifty-fourth interest under the heirs of John S. Watts as follows:

1. Instrument of September 30, 1884, which they allege (and we deny) to be an absolute conveyance of two-thirds interest.

2. David W. Bouldin to John Ireland and Wilbur H. King, for one-ninth of grantor's interest (P. R. 312).

3. Devolution to intervenors of one-half of John Ireland's interest, being one fifty-fourth of whole (P. R. 150).

Margaret W. Wise

She claims and was allowed an undivided one-half of the one-nineteenth interest which it is alleged was in Antonio Baca, or Jose Antonio Baca, as the son of Luis Maria Baca, deceased.

If Antonio was in fact an heir and entitled to a one-nineteenth interest in the tract, the record shows that Joseph E. Wise and Margaret W. Wise each have an undivided one thirty-eighth interest in the tract at bar.

Lucia J. Wise

She claims certain small parts by adverse possession under recent homestead entries, although it has been adjudicated that the tract at bar ceased to be public land on April 9, 1864, after which time no homestead or mineral entry could be initiated. We contend that adverse possession could not commence to run until December 14, 1914, when the official plat of survey of the tract was filed.

DECISION OF TRIAL COURT.

The court below decided that the Hawley deed on its face conveyed the whole of the 1863 tract (P. R. 417);

that Antonio Baca was in fact an heir of Luis Maria Baca; and that Joseph E. Wise and Margaret W. Wise are each entitled to one thirty-eighth of the whole under Antonio Baca.

Recognizing the Robinson-Bouldin partitions, the trial court gave the plaintiffs eighteen-nineteenths of the south half, and the Bouldins eighteen-nineteenths of the north half. These fractions were used because of the decision as to Antonio Baca.

SPECIFICATION OF ERRORS

We contend that the trial Court erred in the following particulars:

1. Admitting the indefinite and unproved title bond to Wrightson (P. R. 183) to construe a later deed to Hawley (P. R. 193).
2. Admitting the testimony of Col. Syme that he received the title bond in 1894 as part of the title papers, or in the course of or in connection with the title (P. R. 187 to 190).
3. Admitting the letter of March 27, 1864 from John S. Watts to Wrightson (P. R. 190), to construe the deed made to Hawley in 1870.
4. Deciding that the deed to Hawley passed the 1863 tract, instead of the land correctly described therein by metes and bounds, and that the Hawley deed title is in the plaintiffs and the Bouldins.
5. Rejecting the deeds from Mathews and Syme to Arizona Copper Estate (P. R. 413), from Arizona Copper Estate to A. M. Fowler (P. R. 413), and

from A. M. Fowler to Santa Cruz Development Company (P. R. 414), which were offered to show that the plaintiffs had no title and that the title they claimed is in Santa Cruz Development Co.

6. Rejecting the testimony of John Watts (P. R. 298) that neither he nor his mother, brother or sisters received any money consideration for the instrument of September 30, 1884, and determining the real consideration therefor (P. R. 307).

7. Rejecting the testimony of John Watts (P. R. 305, 308), that neither he nor David W. Bouldin ever regarded or referred to the instrument of September 30, 1884 in any way than as a contract or agreement, and in refusing to admit Mr. Bouldin's letter (P. R. 415) referring to the instrument as a contract or agreement.

8. Holding that Antonio Baca was an heir of Luis Maria Baca; admitting and following the testimony of Marcos Baca that in 1873 or thereabouts he was informed by certain sons of Luis Maria Baca that Antonio was in fact a son of said Luis Maria Baca, and had died leaving issue; and decreeing that Joseph E. Wise and Margaret W. Wise by various conveyances had each an undivided one thirty-eighth of the property through the heirship of the alleged Antonio. (This branch of the case is discussed in a separate brief.)

9. Not decreeing that Santa Cruz Development Company had the sole title to the property at bar (with the exception of a very small part in the northeast corner, known as the Alto mining property, and

sold at a tax sale June, 1914), and in not quieting the title of Santa Cruz Development Company as aforesaid.

ANALYSIS OF THE BILL

The Bill reads like one in an action to reform a deed, but concededly this action is only to quiet title and not to obtain any reformation.

The necessity for reforming the Hawley deed before any claimant thereunder can succeed in this action (except possibly as to the overlap between the two tracts) is demonstrated by the seventh, eighth, ninth and twenty-third sections of the Bill. According to our understanding, Messrs. Watts and Davis make no claim on this appeal to the overlap.

Seventh Section

The seventh section alleges that between 1866 and 1899,

> "all persons interested, including the Land Office, believed that Baca Float No. 3 was described by the metes and bounds of the so called amended location of 1866."

The succeeding sentence as to the survey has no application, as no one has ever believed that both locations covered the same ground.

Eighth Section

The eighth section states that John S. Watts

> "intended to and did convey to Christopher E. Hawley by the deed of January 8, 1870, Baca Float No. 3 as the same is described in" the metes and bounds of the 1863 tract "as appears by the express terms of said deed; * * * and the description by metes and bounds (of the 1866 tract) * * * was used under the mistaken belief existing at the time said deed was made as to the metes and bounds of the Float."

This section admits that the parties believed the 1866 tract to be Baca Float No. 3, or at least one location thereof, and that they knew the 1866 tract was actually conveyed by the Hawley deed. In spite of this, plaintiffs allege that John S. Watts, by the Hawley deed, "did convey" the 1863 tract by a deed in which the metes and bounds of another tract were knowingly used.

Necessity for Reformation

The eighth section of the Bill also demonstrates that the Hawley title claimants can find relief only in an action for reformation, in which (unless barred by laches and limitation) Hawley could seek to reform his deed so as to make it convey what plaintiffs allege it was "intended" to convey, instead of conveying what the parties

knew it actually conveyed, "under the mistaken belief" referred to in the Bill. Of course Hawley's right to that relief could not pass under a conveyance of the land which he actually received but the right to reformation would be in Hawley alone (*Norris v. Colorado Company,* 43 Pac. 1024; 22 Colo. 162; and cases cited).

Furthermore, the "mistaken belief" was clearly one of law for which no relief can be given.

Plaintiffs' allegations were denied by us in a verified responsive answer and there is no *proof* that either party had any "mistaken belief."

Plea of Limitations

In our amended answer we plead laches and limitations against any reformation of the Hawley deed. As this Court takes judicial notice of the decisions and statutes of every state and territorial court, irrespective of where the action is tried, we need not cite authorities or statutes to prove that limitation and laches now bar any attempt to reform a deed executed in 1870.

Resort to Title Bond

The ninth section sets out the alleged title bond. In the twenty-third section it is alleged that the Watts heirs because of the title bond and the Hawley deed had no title to convey. This is a tacit admission that the Hawley deed, without the widest possible inference from the Wrightson title bond (which by the way described no

property and is not connected with Hawley), is insufficient to pass the 1863 tract, and demonstrates the necessity for reformation.

REJECTED DEEDS

The second, third, fourth and fifth assignments of error relate to the rejection of deeds which show that the plaintiffs have no title. These grew out of the transaction of August 3, 1899, wherein Messrs. Mathews and Syme (from whom the plaintiffs acquired title) previously conveyed to the Copper Estate. The record shows the admitted purport of the rejected deeds (P. R. 413, 414).

Plaintiffs Must Prove Title

In case the decree in No. 2663 is reversed, there is manifest error in the rejection of the deed from Mathews and Syme to The Arizona Copper Estate; that deed demonstrates that Messrs. Watts and Davis had no title, as in 1907 there was none in their grantors.

Plaintiffs in an action to quiet title must prove in themselves a legal title, and they must succeed on the strength of their own title and not on the weakness of that of their adversaries (*Dick v. Foraker,* 155 U. S. 414; and many other cases).

Section 24 of the original Bill (P. R. 25) sets out the Copper Estate transaction. This section was amended out but copied in the record to show that the plaintiffs had knowledge of the transaction.

Irrespective, however, of any question of pleading, we had the undoubted right under our denial of plaintiffs' title (P. R. 37) to show in any way that they had no title (32 Cyc. 1359).

Rejected Deeds Admissible Under Our Answer

In our amended answer we denied the plaintiffs' title; and we claimed title to the entire 1863 tract with the exception of a small part thereof in the northeast corner known as the Alto mining property, sold in June, 1914, at a tax sale. Consequently, we were entitled to substantiate our answer by any deeds in our possession without being required to plead each of them (32 Cyc. 1351, 1359).

We, therefore, had the right to offer in evidence the deeds from Mathews and Syme to The Arizona Copper Estate, from Arizona Copper Estate to A. M. Fowler, and from A. M. Fowler to Santa Cruz Development Company.

Necessity of Offering Deeds

Furthermore, it must be noted that if we had not offered the deeds, any decree against us herein would bar us from all claim to the property under the unoffered deeds, even if the decree in No. 2663 should be reversed. As we would be barred against asserting title under the rejected deeds in case we did not offer them, we certainly had the right to offer them; and the fact that they are the subject of another action is immaterial.

No Necessity for New Trial

As the rejected deeds are in fact in the record, this Court can do full justice between parties, without ordering a new trial.

WRIGHTSON TITLE BOND

Our sixth and seventh assignments of error as filed relate to the alleged title bond from John S. Watts to William Wrightson (P. R. 183), and the testimony with reference thereto (P. R. 187 to 190).

The paper contains no reference to the land involved herein. Furthermore there is not the slightest proof or allegation of any assignment from Wrightson to Hawley, nor any proof of the signature of John S. Watts.

Evidence

The only evidence with reference to the instrument is that in 1894 James Eldridge handed to Col. S. A. M. Syme a satchel of papers and that this instrument was later found in that satchel (P. R. 187 to 190). Neither Mr. Eldredge nor Col. Syme was then interested in the title and no comment was made by Mr. Eldredge about the instrument. The failure to connect the instrument is self-evident.

Inadmissible Without Proof

There is no Arizona or Federal statute (and certainly no rule of evidence) allowing a Federal equity court to

receive a contract in evidence, without proof of execution, on an acknowledgment taken outside of Arizona in 1864, especially where (as in this case) there is no proof of the Notary's authority to take acknowledgments. "No (Arizona) statute is retroactive unless expressly so declared therein" (*Ariz. Code of 1913,* Sec. 5550); and section 1746 of that Code, which may be cited against us, clearly contemplates only future acknowledgments.

Not Admissible as an Ancient Document

The paper canont be proved as an ancient document:

1. The signature of John S. Watts could readily have been proved by any one of his four living children;
2. Its subject matter is uncertain;
3. It has never been recorded nor in any way brought to the attention of adverse parties so as to establish it by their silence;
4. Its present custody is not in any way connected with Wrightson;
5. As the title bond did not run to Hawley, the present custody is as consistent with a cancellation of the instrument as with an assignment of it;
6. No act or possession thereunder has been shown;
7. There is no evidence apart from its custody that it related to the property in suit.

See *Wilson v. Snow,* 228 U. S. 217.

Mere custody of an ancient *private* document is not sufficient proof of its genuineness.

Certainly mere custody does not prove the *subject matter* of the instrument; and without proof of subject matter, it was inadmissible even if its *genuinesss* were proved as an ancient document.

Effect of Reliance on Title Bond

The reliance on the alleged title bond is a confession that the Hawley deed alone is not sufficient to convey the 1863 tract. This demonstrates that the deed requires reformation.

As the plaintiffs disavowed any desire for reformation, they have demonstrated, by their reliance upon the alleged title bond, that they cannot have quieted herein a title which they tacitly confess the Hawley deed alone does not convey.

Purpose of Offer

The title bond, and the testimony with reference thereto, were offered simply to *give the impression* that John S. Watts sold the 1863 tract before its location to William Wrightson and that in some way Hawley succeeded to the latter's rights.

As this is not an action to reform the Hawley deed, neither the title bond nor the testimony was competent.

Deed extinguishes executory contract

A deed extinguishes an executory contract for the conveyance of real property; and the deed is the sole in-

strument from which the intention of the parties and the extent of the conveyance can be ascertained.

Parker v. *Kane,* 22 How. (U. S.) 1, 18;
Van Ness v. *Washington,* 4 Pet. (29 U. S.) 232, 284;
Martin v. *Waddell,* 16 Pet. 367, 416;
Prentice v. *N. P. R. R. Co.,* 154 U. S. 163; where the negotiations and the collateral evidence of intent (pp. 166 to 169) were not considered by the Court, which "looked into the deed * * * for the intentions of the parties."
Potomac Steamboat Co. v. *Upper Potomac Co.,* 109 U. S. 672, 680, 681;
Carter v. *Beck,* 40 Ala. 599;
Bryan v. *Swain,* 56 Cal. 616;
Thorndike v. *Richards,* 13 Me. 430;
Clifton v. *Jackson Iron Co.,* 41 N. W. 891; 74 Mich. 183; 16 Am. St. Rep. 621, with monographic note;
Turner v. *Cool,* 23 Ind. 56; 85 Am. Dec. 449;
Hempe v. *Higgins,* 85 Pac. 1019; 74 Kan. 296;
Horner v. *Love,* 64 N. E. 218; 159 Ind. 406;
Cronister v. *Cronister,* 1 W. & S. (Pa.) 442.
Jones v. *Wood,* 16 Pa. 25

Analysis of title bond

An examination of the alleged title bond will show:

1. It was dated before the 1863 tract was selected; it describes no particular property nor anything

from which a description can be supplied, and it cannot be connected with either selection of Baca Float No. 3. There were five locations under the Act of 1860, and several of them had more than one selection. Subsequently John S. Watts became the owner of four of the five locations.

2. Location No. 5 as well as Location No. 3 was "unlocated" at the date of the paper (P. R. 403).
3. Wrightson died before the 1866 tract was selected (P. R. 176) by John S. Watts as attorney for the Baca heirs. The conveyance of that tract to Hawley was clearly an independent transaction.
4. There is neither allegation nor the slightest evidence of any assignment by Wrightson to Hawley.
5. The first appearance of the paper is in 1894 (P. R., 189) and the plaintiffs allege only that they are now in possession of it (P. R. 8).
6. There was a lapse of seven years between the contract and the deed and many modifications can be made in an executory contract in that length of time. Over fifty years have passed since the contract was made and no Court could now say that it was not fully and correctly performed (*Van Ness* v. *Washington*, 4 Pet. (29 U. S.) 232, 284 supra).
7. There has never been any complaint by Wrightson or Hawley that the deed was not a proper execution of any alleged contract.
8. The contract itself did not pass title to the 1863 tract because:

a. That location had no existence at that time.

b. The instrument can refer to Location No. 5 as well as Location No. 3 (P. R. 409), both of which were "unlocated" on March 2, 1863; and also to Location Nos. 2 and 4 which John S. Watts acquired with Location No. 3 on May 1, 1864 (P. R. 154), and to the second selection of Location No. 5 which he acquired on May 30, 1871 (P. R. 197).

c. The instrument contemplated a future conveyance (See authorities cited on p. 85 as to the Bouldin paper).

d. The instrument called for a location by Wrightson; he did not make the location of June 17, 1863, and never sought to have any trust impressed thereon.

9. There is not the slightest proof of its execution and there is no warrant for its reception in evidence on the purported acknowledgment in 1864; and the clerk's certificate does not set forth that the Notary Public was authorized to take acknowledgments.

LETTER FROM JOHN S. WATTS TO WILLIAM WRIGHTSON

Our eighth assignment of error as filed relates to the alleged letter from John S. Watts to William Wrightson, dated March 27, 1864, with the endorsement thereon, and known as "Plaintiffs' Exhibit M" (P. R. 190).

The copy offered was neither the original nor certified. It was simply an uncertified typewritten copy of an ambiguous letter which appeared in the Record in the case of *Lane* v. *Watts.*

Not admissible under stipulation

Under a stipulation (P. R. 118), every party herein was allowed to offer in evidence without authentication certain papers in the record in *Lane* v. *Watts,* but there is nothing in the stipulation covering a letter from one private individual to another. The stipulation was carefully limited, and drawn with the intent to exclude this particular letter unless it was authenticated or proved; the signature to the letter in the Land Department files does not in any way correspond with the signatures of John S. Watts which we have seen.

Notation inadmissible

The copy of the notation made on the paper by a clerk in the Land Office is clearly inadmissible; besides, it shows that the letter was apparently received on May 26, 1864, some time after the Commissioner had finally acted on April 9, 1864, with reference to the 1863 tract.

Conclusion

There is no connection shown between Wrightson and Hawley; neither the letter nor the notation proves its

subject matter and the letter is fully consistent with a representative relation.

The trial Court clearly erred in admitting the letter and the notation. After a lapse of fifty years, ambiguous, unauthenticated copies are open to every suspicion and should be most carefully scrutinized.

RULE FOR CONSTRUCTION OF DEEDS

The rules for the construction of deeds are rules of property and the security of titles demands a rigid observance thereof.

The construction of the deeds through which Messrs. Watts, Davis and the Bouldins claim title is governed, both at law and in equity, by the following rules:

Intent must be found in deed

It is the duty of the Court to declare the meaning of what was written in the instrument, not of what was intended to be written. Nothing passes by a deed except what is described in it, whatever the intention may have been.

Guilmartin v. Wood, 76 Ala. 204 209;

Coleman v. Manhattan Beach Co., 94 N. Y. 229, 232;

Gaddes v. Pawtucket Savings Institution, 33 R. I. 177, 186; 80 Atl. 415, 418;

Hartmyer v. Everly, 79 S. E. 1093, 1095; W. Va.;

Collins v. Degler, 82 S. E. 265, 266; W. Va.;
Cassidy v. Charlestown Savings Bank, 21 N. E. 372; 149 Mass. 325;
17 *A & E. Ency. Law* (2nd Ed.) 3;
17 Cyc. 616 to 619.

The written intent controls, and not a "conjectural intent."

Van Ness v. Washington, 4 Pet. (29 U. S.) 232, 285;
Potomac Co. v. Upper Potomac Co., 109 U. S. 672, 680, 681.

Construction of Descriptions

"Where the grantor in a deed owns lands which comply with all the particulars of the description, the deed passes title to those lands only, although it may appear that the grantor intended other premises to pass also, which were included within only a part of the description."

"In arriving at the false description which is to be rejected, the rule is that a (definite) particular or specific description will control a general or implied description, in whatsoever order they may appear."

4 *A & E. Ency. Law* (2nd Ed.) 799, 800.

Conflict between General and Specific Descriptions

In case a definite specific description by metes and bounds conflicts with title references or general words of description, then the specific description prevails, irrespective of whether the general description or the statement of the source of title precedes or follows the specific description. Such is the rule not only in the United States Courts but in every state court in which the question has been presented for decision.

4 *A & E. Ency.* (2nd Ed.) 799c;
5 *Cyc.* 926;
Washburn on Real Property (6th Ed.), Sec. 2318;
Tiedeman on Real Property (2nd Ed.), Sec. 829;
Bock v. Perkins, 139 U. S. 628, 634;
Prentice v. N. P. R. R. Co., 154 U. S. 163;
Prentice v. Stearns, 113 U. S. 435;
Parker v. Kane, 22 How. 1;
Howard v. Saule, Fed. Cases No. 6782; 5 Mason 410; Story, J.;
Coppermines Co. v. Comins, 148 Pac. 349; Nev.
Raymond v. Coffey, 5 Ore. 132, 135;
Piper v. True, 36 Calif. 606, 619;
Guilmartin v. Wood, 76 Ala. 204, 210;
Cassidy v. Charlestown Savings Bank, 21 N. E. 372; 149 Mass. 325;
Whiting v. Dewey, 15 Pick. (Mass.) 428, 434;

Crabtree v. Miller, 80 N. E. 225; 194 Mass. 123;

Dana v. Middlesex Bank, 10 Met. (51 Mass.) 250;

Muto v. Smith, 55 N. E. 1041; 175 Mass. 175;

Dow v. Whitney, 16 N. E. 722; 147 Mass. 1;

Tyler v. Hammond, 28 Mass. (11 Pick.) 193;

Hamlin v. Attorney General, 81 N. E. 275; 195 Mass. 309;

Lovejoy v. Lovett, 124 Mass. 270;

Jones v. Smith, 73 N. Y. 205;

White's Bank v. Nichols, 64 N. Y. 65;

Sherman v. McKeon, 38 N. Y. 266;

Burnett v. Wadsworth, 57 N. Y. 634;

Texas Ry. Co. v. Scott, 129 S. W. 1170, 1178; Texas;

Schaffer v. Heidenheimer, 96 S. W. 61; Texas C. A.;

Ridgell v. Atherton, 107 S. W. 129, 132; Texas C. A.;

Cullers v. Platt, 16 S. W. 1003; 81 Tex. 258;

Tate v. Betts, 97 S. W. 707; Tex.;

Poggess v. Allen, 56 S. W. 195; Texas;

Bender v. Chew, 56 South. 1023; 129 La. 849;

Hannibal v. Green, 68 Mo. 168;

Pendergras v. Butcher, 164 S. W. 949, Ky.;

Smith v. Sweat, 38 Atl. 554; 90 Me. 528;

Cochrane v. Harris, 84 Atl. 499; 118 Md. 295;

Gaddes v. Pawtucket Inst., 80 Atl. 415; 33 R. I. 177;

Wharton v. Brick, 8 Atl. 529; 49 N. J. Law 289;

Cummings v. Black, 25 Atl. 906; 65 Vt. 76;

Carter v. White, 7 S. E. 473; 101 N. C. 30;

Osteen v. Wynn, 62 S. E. 37; 131 Ga. 209;

Shackelford v. Orris, 59 S. E. 772; 129 Ga. 791;

Baltimore B. & L. Assn. v. Bethel, 27 S. E. 29; 120 N. C. 344;

Pardee v. Johnson, 74 S. E. 721, 723; 70 W. Va. 347;

Glenn v. Augusta Co., 40 S. E. 25; 99 Va. 695;

Nichols v. N. E. Furn. Co., 59 N. W. 155; 100 Mich. 230;

Nutting v. Hurbert, 35 N. H. 120;

Woodman v. Lane, 7 N. H. 241;

Barnard v. Martin, 5 N. H. 536;

Thorndike v. Richards, 13 Me. 430;

Brunswick Savings Inst. v. Crossman, 76 Me. 577;

Gano v. Aldridge, 27 Ind. 294;

McEowan v. Lewis, 26 N. J. Law. (2 Dutch) 451;

Wright v. Mabry, 9 Yerk. (17 Tenn.) 55;

Fletcher v. Clark & Burton, 48 Vt. 211;

Spiller v. Scribner, 36 Vt. 245;

Morrow v. Willard, 30 Vt. 118;

Benedict v. Gaylord, 11 Conn. 332; 29 Am. Dec. 299.

Illustrative Cases

Prentice v. N. P. R. R. Co., 154 U. S. 163. This case has striking similarities to that at bar. The deed was the same as in *Prentice v. Stearns*, 113 U. S., 435 and it is printed in full on pages 440 and 441 of the latter case. It was a quitclaim deed for a half interest in a tract of land one mile square, described by metes and bounds, and concluding:

> "Being the land set off to the Indian Chief Buffalo at the Indian Treaty of September 30, 1854, and was afterwards disposed of by said Buffalo to said Armstrong (the grantor) and is now recorded with the Government documents."

At the time of the deed the land specifically described had not in fact been officially set off, but the grantor had a transfer of the rights of Chief Buffalo who had made a selection in general terms in the locality of the specific description. The grantor then had no other land or land rights in the same county; and later he admitted that he intended to convey his general rights and not the specific tract. The deed was not executed in the locality of the property.

The Court held:

1. The specific description controlled and furnished the best evidence of the intention of the grantor (p. 173), although the land therein was largely under the waters of Lake Superior.

2. The quoted references referred only to the specific description and did not convey the lands subsequently allotted to Armstrong in lieu of the land selected by Buffalo.
3. The references only gave the sources of title and were not to be considered as an independent description, even through the recited instruments conveyed the much desired general rights.
4. Even if considered as a general description the title references could not control the specific description (p. 173).
5. The deed was for a definite tract of land with a fixed beginning point and not of the grantor's general rights.
6. If a transfer of general rights or of any subsequently approved location had been intended instead of the specific tract the deed should have so stated (p. 175).

The Court in distinguishing this case from two cases wherein there had been no selection of specific tracts said:

> "In the case before us, not only had Buffalo made this selection and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; it was a thing which could be conveyed specifically; and which Armstrong undertook to convey specifically."

By comparing the *Prentice* cases with those cited in the opinion of the Court therein and with the case of *Piper v. True*, 36 Cal. 606, chiefly relied upon by Senator Root and Judge Dillon, counsel for the unsuccessful party, it will be seen that where a grantor conveys *by*

metes and bounds lands selected under a statute or treaty, his deed will cover only the metes and bounds and not the land subsequently allotted, in spite of references in the deed to his source of title or the name of his grant, even though his right to the specific land had not fully vested or thereafter failed.

Bock v. Perkins, 139 U. S. 628. A deed of general assignment, after reciting an intention to make distribution of debtor's property among creditors, conveyed

> "all the lands * * * of the said party of the first part, more particularly enumerated and described in * * * Schedule A, *or intended so to be.*"

The deed was limited by the Court to the items in the schedule or specific description.

Parker v. Kane, 22 How. (U. S.) 1. The deed conveyed an undivided fractional interest in,

> "lots 1 and 6, being that part of the N. E. ¼ lying E. of the Milwaukee river, etc."

The deed was limited by the Court to lots 1 and 6, although the grantor and grantee had been jointly interested in "that part of the N. E. ¼ lying E. of the Milwaukee river," and the parties evidently intended the deed to be a statement of their interests therein. The Court said that the description by lot numbers was a complete identification of the land and that everything inconsistent therewith must be rejected.

Cassidy v. Charlestown Savings Bank, 21 N. E. 372; 149 Mass. 325. The grantor conveyed by metes and bounds a lot which he did *not* own, which adjoined one that he *did* own, and then referred to the deed which correctly described the lot which he did own. The Court (Mr. Justice Holmes, now of the United States Supreme Court, concurring) held the instrument to the specific description.

Guilmartin v. Wood, 76 Ala. 204. This case is noteworthy for its succinct statement of the rule:

> "General words of description cannot override a particular description. It is a principle long and well settled, that where a conveyance describes the premises by clear and definite metes and bounds from which the boundaries can be readily ascertained, such description shall prevail, and determine the boundaries and location, over general words of description (citing authorities.) The presumption is, the grantor intended to convey the land thus clearly and particularly designated."

Coppermines Co. v. Comins, 148 Pac. 349 (Nev., 1915). The deed conveyed

> "all those parcels of land * * * commonly known as and called the Comins Ranch, and more particularly described" by enumerated legal subdivisions, "containing 1,600 acres more or less."

It was held to the particular description; and a long contiguous strip of about 65 acres was excluded, although included within the fences of the ranch.

Dana v. Middlesex Bank, 10 Met. (51 Mass.) 250. This case has been frequently cited. The deed, after a description by metes and bounds, stated that the lots were the same set off in certain partition deeds, "or however either of said pieces of land may be bounded"; but the Court said:

> "the description by metes and bounds is to prevail, although a different description is given by reference to the grantor's title deeds."

Muto v. Smith, 55 N. E. 1041; 175 Mass. 175. A mechanic's lien for improving realty, instead of describing the parcel on which the work was done, described the rest of the premises, "being the same premises described in deed" to owner, which covered both parcels, and in a mortgage which covered only the land specifically described. The opinion written by Mr. Justice Holmes (now of the United States Supreme Court) held that even if the title references had agreed, they would not override the specific description, although the work described in the notice of lien had been done on the omitted parcel; and that the *falso demonstratio* rule did not apply.

Mention of Tract Name.

Where land is conveyed by its name and also by specific boundaries, the latter will control, except in extraor-

dinary cases where the conveyance is expressly and primarily of an entire island, or other tract of shifting or indefinite boundaries, and not of metes and bounds thereof which are stated to be "*known as*" the tract or island in question.

An example of the exceptional cases is found in *Lodge v. Lee,* 6 Cranch 237, which was a conveyance of an island as such, followed by an attempt at specific boundaries; naturally the Court held that the island itself was intended to be conveyed and not the particular metes and bounds of the island, as their relation to the island changed hourly with the rise and fall of the water.

These principles are demonstrated by a comparison of *Lodge v. Lee,* supra, with the following cases:

Carter v. White, 7 S. E. 473; 101 N. C. 30;
Coppermines Co. v. Comins, 148 Pac. 349;
Guilmartin v. Wood, 76 Ala. 204;
Osteen v. Wyn, 62 S. E. 37; 131 Ga. 209;
Baltimore B. & L. Assn. v. Bethel, 27 S. E. 29; 120 N. C. 344;
Fletcher v. Clark, 48 Vt. 211;
Woodman v. Lane, 7 N. H. 241;
Thorndike v. Richards, 13 Me. 430;
Jones v. Smith, 73 N. Y. 205;
Burnett v. Wadsworth, 57 N. Y. 634;
Glenn v. Augusta B. & L. Co., 40 S. E. 25; 99 Va. 695;
Tyler v. Hammond, 28 Mass. (11 Pick.) 193.

Where the tract name clause is parenthetical to the specific description or follows it as a general state-

ment, then it is subordinate to the specific description and simply refers thereto (*Prentice v. N. P. R. R. Co.,* 154 U. S. 163, 174).

If, however, there are two tracts of land by the same name, a conveyance of the metes and bounds of one of them does not convey the other tract of the same name (*Russell v. Trustees,* 1 Wheat. 432, 437).

Wherever a conveyance by tract name has been held superior to the metes and bounds thereof, it has been done to supply deficiencies in specified boundaries, and not to convey an entirely different tract or another tract of the same name.

Effect of Subsequent Change of Situation

A description is construed in the light of circumstances actually existing at the time of its use.

This is best illustrated in three interesting cases where the same description was used in successive deeds; but, owing to a change in location of monuments, street lines or neighboring ownership, a later description was held to have a meaning different from the identical description in the prior deeds.

White's Bank v. Nichols, 64 N. Y. 65, 72;
Sherman v. McKeon, 38 N. Y. 266;
Smith v. Sweat, 38 Atl. 554; 90 Me. 528.

Appurtenance Rule

"Of two tracts of land one can never be appurtenant to the other, for though the possession of the

one may add greatly to the benefit derived from the other, it is not an incident of the other or essential to the possession of its title or use; one can be enjoyed independently of the other. * * * All that can be reasonably claimed is that the word 'appurtenances' will carry with it easements and servitudes used and enjoyed with the lands for whose benefit they were created."

Humphreys v. McKissock, 140 U. S. 304, 314;
Harris v. Elliott, 10 Pet. (U. S.) 25, 54;
New Orleans P. R. R. Co. v. Parker, 143 U. S. 42;
Jones v. Johnston, 18 How. (U. S.) 155;
Woodhull v. Rosenthal, 61 N. Y. 382, 390;
Donnell v. Humphreys, 1 Montana 518, 525;
Jackson v. Hathaway, 15 Johns. 447; 8 Am. Dec. 263;
Leonard v. White, 7 Mass. 6; 5 Am. Dec. 19;
Riddle v. Littlefield, 53 N. H. 503; 16 Am. Rep. 388;
Griffiths v. Morrison, 106 N. Y. 165;
Ogden v. Jennings, 62 N. Y. 526, 531;

A fee title to land never passes as an appurtenance to other land. An appurtenance is a mere incorporeal hereditament, a mere easement over or servitude upon other land of the grantor, absolutely necessary for the grantee to have in order to enjoy the land actually granted; and the right exists only to the extent of the necessity therefor and never passes the fee of the servient estate.

False Demonstratio Rule

Where the specific description correctly describes a tract of land, it cannot be rejected as false, except in an action to reform the deed.

The *falso demonstratio* rule never applies where the specific description correctly describes some tract (*Washburn on Real Property,* 6th Ed., sec. 2319; *Tiedman on Real Property,* 2nd Ed., sec. 829). It is only applicable where there is a self-evident mistake or deficiency in some detail of course or distance which unless disregarded would render the instrument meaningless. It is applied only when by the inclusion of the *falso demonstratio* the deed would convey nothing, but by the exclusion it would convey some definite land (*Broom's Legal Maxims,* 7th Ed., p. 637).

If through inadvertence the *wrong tract* has been described, the grantee must have the deed reformed (*Prentice v. N. P. R. R. Co.,* 154 U. S. 163, 176).

A well ascertained beginning point cannot be disregarded as a *falso demonstratio* so as to make the deed cover another tract of land.

Prentice v. N. P. R. R. Co., 154 U. S. 163, 173, 175;

Russell v. Trustees, 1 Wheat. 432, 436, 437;

Davis v. George, 134 S. W. 326; 104 Tex. 106;

Muto v. Smith, 55 N. E. 1041; 175 Mass. 175;

Cassidy v. Charlestown Savings Bank, 21 N. E. 372; 149 Mass. 525.

Recitals Import Notice

Title references in a deed put a grantee on inquiry and constructive notice of the contents thereof; and the grantee is conclusively presumed to know all that an examination of the recited title references would have disclosed.

Devlin on Real Estate Deeds (3rd Ed.) Sec. 1000 to 1004;
Brush v. Ware, 16 Pet. 93, 111 to 113;
U. S. v. Maxwell Land Grant Co., 21 Fed. 19, 24 (Opinion by Brewer, J.);
Simons Co. v. Doran, 142 U. S. 417, 437 to 439;
U. S. v. San Pedro Co., 17 Pac. 337, 401; 4 N. M. 225; aff'd in 146 U. S. 120, 139.

Practical Construction

The practical construction of a deed by the parties thereto is of very great weight in construing any ambiguity therein. "Tell me what you have done under your deed and I will tell you what the deed means."

Lowry v. Hawaii, 206 U. S. 206, 222;
Irvin v. U. S., 57 U. S. (16 How.) 513, 523, 524;
Steinbach v. Stewart, 11 Wall. 566, 576;
Topliff v. Topliff, 122 U. S. 121, 131;
Van Ness v. Washington, 4 Pet. (29 U. S.) 232, 284;
Blumenthal v. Blumenthal, 158 S. W. 648, 652;

251 Mo. 693;
Collins v. Deglar, 82 S. E. 265 (W. Va. 1914);
Blais v. Clare, 92 N. E. 1009; 207 Mass. 67.

The best evidence of the grantee's construction of a deed is the possession which he took under it.

Summary

The foregoing rules as to the construction of deeds may be summarized as follows:

1. A deed is conclusively presumed to express fully the intention of the parties.
2. In construing a description, an endeavor must first be made to find land which will answer the metes and bounds and the general calls.
3. In case definite metes and bounds conflict with title references or general words of description, then the metes and bounds prevail.
4. In a conveyance of a tract by metes and bounds, with a statement that it is "known as" or by a certain name, the description by metes and bounds prevails in case of any discrepancy.
5. The construction of a deed is not affected by a subsequent change of situation by which some other tract becomes "known as" or by the same name as the tract specifically conveyed.
6. A fee title to land never passes as an appurtenance to other land.
7. The *falso demonstratio* rule never applies where the specific description clearly describes a tract in

which the grantor had or was supposed to have an interest.

8. The recitals in a deed put a grantee on inquiry and constructive notice as to everything which an investigation thereof would determine.
9. The practical construction of a deed by the parties and their representatives in interest, and the possession taken thereunder, is of great weight in construing any ambiguity therein.

APPLICATION OF RULES TO INTERMEDIATE DEEDS

These rules are readily applied to the deeds in the chain of title under the Hawley deed.

Every deed in that chain of title (see page 15 herein), from the Hawley deed to and including the deed to Watts and Davis, is a *quitclaim* deed; and every deed therein, except the deed to Watts and Davis, has as a specific description only the metes and bounds of the 1866 tract or a half thereof.

The intermediate deeds contain no statement of the manner in which John S. Watts acquired his title. Their description consists simply of the metes and bounds of the 1866 tract or a half thereof, "said tract being known as Location No. 3 of the Baca series." Most of the deeds also give the Santa Rita Mts. as the locality; and some even state specifically that the metes and bounds are correct.

The claimants under the Hawley deed must, therefore, prove that a description by metes and bounds of the 1866

tract in the Santa Rita Mts., "said tract being *known as* location No. 3 of the Baca Series," conveys on its face the 1863 tract, which is not in the Santa Rita Mts., and was not then "*known as* location No. 3 of the Baca series."

We contend that inasmuch as the metes and bounds in the Hawley chain correctly describe a tract of land then in fact "known as Location No. 3 of the Baca Series," and in which tract John S. Watts had some quitclaimable interest in 1870, they can be rejected only in an action to reform, and concededly this is not such an action.

Prior Conveyance by Plaintiffs' Grantors

Messrs. Watts and Davis acquired title under a trust indenture from Samuel A. M. Syme and the heirs of Alex. F. Mathews, dated February 8, 1907, and recorded on March 20 1914.

Prior thereto Messrs. Mathews and Syme had conveyed all their interest in the property to The Arizona Copper Estate by deed dated August 3, 1899, and recorded on August 12, 1899 (P. R. 413).

If the decree in No. 2663 in this Court is reversed, Col. Syme and the heirs and legal representatives of Alex. F. Mathews had no title to convey to Watts and Davis, and, therefore, the latter have none in any event.

Deeds to Alex F. Mathews

Alex F. Mathews acquired his title by a number of quitclaim deeds dated in September, 1893. The identical

description appears in all of those deeds and is as follows:

> "All of his right, title and interest in that certain tract of land * * * which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand acres more or less, the said southern half thereby conveyed * * * contains fifty thousand acres more or less, and is bounded as follows:" (Here follows description by metes and bounds of the southern half of the 1866 tract.)

Counsel for Watts and Davis ask the Court to disregard the metes and bounds of the 1866 tract, leaving as the description:

> "all that certain tract of land which is the southern half of the tract of land *known as* Baca Float No. 3."

Section Seven of the plaintiffs' Bill avers that between 1866 and 1899 the 1866 tract was believed to be Baca Float No. 3; consequently it was then "known as Baca Float No. 3." It is undisputed that at the time of the deeds in question the 1866 tract was in fact "known as Baca Float No. 3" and appeared on the maps as such The deeds, therefore, convey just what they describe in metes and bounds—the southerly half of the 1866 tract.

On February 7, 1894 (P. R. 229), Mr. Mathews took a confirmatory deed from the Bouldins reciting that the grantors by deed dated November 12, 1892,

> "did convey to John C. Robinson a certain tract of land * * * known and described *fully and accurately* in said deed, and which is *known as* the lower or southern half of a tract of land *known* as Location No. 3 of the Baca series *in the Santa Rita Mts.*," and the intention of the parties that Mr. Mathews should have the entire 50,000 acres "by said deed described and conveyed *and included in the metes and bounds by said deed given*";

and the Bouldins again conveyed to Mr. Mathews by the identical description of the deeds taken by him in 1893. There is a clear intention in this deed to take only the metes and bounds of the southerly half of the 1866 tract "in the Santa Rita Mts.," far removed from the southerly half of the 1863 tract.

The petition presented to the Secretary of the Interior in 1901, *signed by Mr. Mathews and by Conrad H. Syme, his attorney, shows unmistakably that Mr. Mathews and his predecessors knew that they were acquiring only the* 1866 *tract* (P. R. 396) *and there is no allegation nor proof herein that there was any error or "mistaken belief" of any kind in these deeds.*

Deed to S. A. M. Syme

After making quitclaim partition conveyances of the northern half of the 1866 tract to the Bouldins, Mr. Robinson, on April 30, 1896 (P. R. 212), quitclaimed to Col. Syme:

"All of his right, title and interest in both law and equity in and to a certain tract or body of land * * * containing some fifty thousand acres more or less and described as follows, viz: the upper or north half of a tract of land of some one hundred thousand acres more or less *known as* Baca Location of Float No. 3, and bounded as follows:"

(Here follows a description by metes and bounds of the north half of the 1866 tract.)

In their Bill the plaintiffs carefully and elaborately set forth the reasons why this deed in fact passed some title to Col. Syme.

Under stress of circumstances the plaintiffs abandoned at the trial their efforts to set aside the partition between Mr. Robinson and the Bouldins, and now claim that this deed passed no title.

Deed from Robinson to Cameron

In this deed, dated December 1, 1892 (P. R. 255), Mr. Robinson quitclaimed:

"All his right, title and interest in and to that certain tract of land * * * the same being the south half of the tract of land *known as* Baca Float No. 3 * * * the said southern half of said tract of land having been conveyed to the said party of the first part by deed of partition * * * dated November 12, 1892, bounded and described as follows:"

(Here follows the description by metes and bounds of the southern half of the 1866 tract.)

The comments made on the deeds to Mr. Mathews apply with equal force to this deed.

Robinson-Bouldin Partitions

The final partition between Mr. Robinson and the Bouldins was made by interchanging two deeds, one dated November 12, 1892 (P. R. 216), to Mr. Robinson and the other dated November 19, 1892 (P. R. 400) to the Bouldins. These deeds recite another partition by deeds (not in evidence herein) dated June 28, 1892 and August 22, 1892, whereby the parties had conveyed to each other,

> "One undivided one-half interest in all their right, title, property claims and demands, whatsoever, from whatever source derived and in whatever manner acquired in, and to a certain tract of land situate, lying and being in the *Santa Rita Mts.* * * * bounded and described as follows, viz:"
>
> (Followed by the metes and bounds description of the 1866 tract.)
>
> "The said tract of land being *known as* Location No. 3 of the Baca Series."

It was then set forth that

> "In order to make a full, perfect and absolute partition of the above described premises, and in order that each of the said parties * * * may

hold their share under the above described deeds in severalty," the Bouldins conveyed to Mr. Robinson "one-half of the above described premises bounded and described as follows:"

(Followed by the description by metes and bounds of the southern half of the 1866 tract.)

"The said tract of land bounded and described *in the sentence immediately foregoing this* being the southern half of the tract *known as* Location No. 3 of the Baca Series."

The deed of November 19, 1892 (P. R. 400) from Mr. Robinson to the Bouldins was in the same form as the deed of November 12, 1892 which they gave Mr. Robinson, with the exception that it conveyed specifically the north half of the 1866 tract instead of the south half.

The partition by its terms superseded all previous agreements and was clearly of right, title and interest in the 1866 tract in the Santa Rita Mts., which the parties called and which was then in fact known as Location No. 3 of the Baca Series. The 1866 tract is the tract of which David W. Bouldin, the attorney-in-fact for his sons, took actual possession in 1887 and had surveyed and monumented (P. R. 235).

Being a partition of right, title and interest in the 1866 tract, the Bouldins acquired nothing thereunder; and the utmost that Mr. Robinson acquired was the overlap between the 1863 and 1866 tracts, as that is in the south half of the 1866 tract.

CONSTRUCTION OF HAWLEY DEED

This deed is a quitclaim, without any word of sale, for a certain, definite tract of land, the 1866 tract, by its correct metes and bounds.

The Hawley deed conveyed and was intended to convey only the 1866 tract, and none of the parties claiming under it made any claim to the 1863 tract until Watts and Davis came into the situation in 1906 or 1907.

Effect of Pleadings

In the Bill (P. R. 7), it is claimed that John S. Watts "intended to and did convey" to Christopher E. Hawley by the deed of January 8, 1870, the 1863 location of Baca Float No. 3, and that the description by metes and bounds of the 1866 tract

> "was used under the mistaken belief existing at the time said deed was made as to the metes and bounds of the Float."

In our verified answer we specifically and positively deny these allegations. No evidence was offered by the plaintiffs to support their averments. As our responsive answer was not overcome by two witnesses or by one witness and strong corroborative circumstances, it must be taken as true: we have "conclusively proved" our denials.

Vival v. Hopp, 104 U. S., 441;
Campbell v. Eckington, 229 U. S. 561, 573, 579, 580, 584;
Southern Dev. Co. v. Silva, 125 U. S. 247, 249;
Beals v. Ill. R. R. Co., 133 U. S. 290, 295.

On the record at bar, this Court must affirmatively assume that in 1870 there was no "mistaken belief" as to the metes and bounds, and that John S. Watts had no intention to convey the 1863 tract.

Only Interpretation required

As the plaintiffs have expressly disavowed any desire to reform the Hawley deed, they must, under the pleadings, demonstrate that the Hawley deed on its face conveys the 1863 tract.

To interpret that deed we shall analyze its various parts and prove the obvious proposition that a conveyance of one tract does not pass the title of another tract.

Conveyance of Specific Tract

The parties were dealing with a specific tract of land and not with general statutory rights; and a specific tract of land is clearly and accurately described.

In the Prentice cases (154 U. S. 163; 113 U. S. 435), we find:

1. Only one selection and that very vague.
2. A specific description largely under water.

3. Unskillful preparation of the deed on a legal blank.

With reference the Hawley deed we find:

1. A carefully prepared instrument.
2. A correct description of a definite tract of land in which the grantor then had an interest.
3. A deliberate choice of one of two selections.
4. The recited instruments indicating a description for the 1863 tract, if there had been any intention to insert it in the conveyance.
5. The maxim "*expressio unius est exclusio alterius*" peculiarly applicable.
6. A uniform use of the specific description for nearly thirty years thereafter, with numerous applications for a survey thereof, declarations that the 1866 tract alone was desired (P. R. 396) and even the selection of specific parts thereof in partitions.

Consequently, *Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 175, 176, is absolutely decisive that only the 1866 tract passed under the Hawley deed:

> "It is not necessary that we resort to the supposition that (the grantor) was talking about some vague and uncertain right—uncertain, at least, as to locality, and as to its relation to the surveys of the United States—which he was intending to convey to (the grantee), instead of the definite land

which he described, or attempted to describe. If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea * * *. We are *not* able, therefore, to hold, with counsel for the plaintiff, that, if this conveyance does not carry the title to any lands which can be ascertained by that description in the deed, resort can be had to the alternative that the deed was intended to convey any land that might ultimately come to (the grantor) under the treaty, and under the selection, and under the assignment" to the grantor of the treaty rights.

Calls of Description

The Hawley deed contains the following calls of description:

1. That (one) certain tract of land,
2. Situate in the Santa Rita Mts.,
3. Described by the metes and bounds of the 1866 tract,
4. "Said tract of land being *known as* Location No. 3 of the Baca Series," referring to the specific description and giving its name at that time (*Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 174).

Title References

There are also in the deed two statements of the source of title:

1. A grant by the United States to the heirs of Baca.
2. A conveyance by the Baca heirs to John S. Watts on May 1, 1864.

These title references are not words of independent description; they only give the grantor's supposed chain of title and refer to the specific description.

Prentice v. N. P. R. R. Co., 154 U. S. 163, 176;
Lovejoy v. Lovett, 124 Mass. 270, 274;
Tyler v. Hammond, 28 Mass. (11 Pick.) 193;
Clark v. Roller, 51 S. E. 816; 104 Va. 72;
Schaffer v. Heidenheimer, 96 S. W. 61; Tex. C A.;
Cullers v. Platt, 16 S. W. 1003; 81 Tex. 258.

Applicability of Calls of Description

The 1866 tract is the only tract which will answer *all* the calls of description in the Hawley deed:

1. It is situate in the Santa Rita Mts.; in fact it is located entirely within those mountains, and no part of the 1863 tract except the overlap lies within the mountains or the foothills.
2. The specific description of the 1866 tract was copied *verbatim,* with the same order of courses as in the application therefor.
3. The Bill avers (Section 7) that the 1866 tract was then in fact "known as Location No. 3 of the

Baca Series," and the testimony herein confirms that contention.

The 1863 tract will satisfy *none* of the calls of description in the Hawley deed:

1. It is not located within the Santa Rita Mts.
2. It does not have the metes and bounds of the 1866 tract.
3. According to Section 7 of the Bill and the evidence, it was not then "*known as* Location No. 3 of the Baca Series."

Applicability of Title References

The 1866 tract will answer both of the title references in the Hawley deed:

1. It was in fact granted to the Baca heirs by the United States on May 21, 1866, through the Commissioner of the General Land Office, whose power was plenary unless and until overruled by the Secretary of the Interior. The application of April 30, 1866 (P. R. 176) was in the name of the Baca heirs.
2. The rights of the Baca heirs therein passed under their deed to John S. Watts of May 1, 1864, conveying the 1863 tract, the valid and approved location, because the conveyance of their rights in the approved location passed with it the right to use their name in any future dealings thereover with

the United States, just as the conveyance of a chose in action gives by implication alone the right to the assignee to use the name of the assignor. Whatever rights John S. Watts had in the 1866 tract certainly came through the deed in question, and the title reference is absolutely accurate.

Analysis of calls and references

The Court will observe:

1. The 1866 tract fits all the calls of description in the Hawley deed and the 1863 tract fits none of them.
2. The 1866 tract answers the title references in the Hawley deed to the same extent as the 1863 tract.

The Hawley deed, therefore, conveyed only the 1866 tract, irrespective of any "conjectural intent" to the contrary.

Washburn on Real Property, 6th Ed. Sec. 2319;
Tiedeman on Real Property, 2nd Ed. Sec. 829;
4 *Am. & Eng. Ency. Law* (2nd Ed.) 799.

Changes necessary.

The Hawley deed cannot apply to the 1863 tract unless three changes are made in that deed:

1. The statement of location in the Santa Rita mountains stricken out.
2. The specific description reformed by substituting the monument and beginning point of another tract.
3. The tract name statement changed to read that the tract was known in the deed to Judge Watts as Location No. 3.

Disregarding metes and bounds

Our opponents ask the Court to "construe" the Hawley deed by eliminating the specific description. This would leave a description as follows:

> "All that certain tract, piece or parcel of land, lying and being in the Santa Rita mountains, in the Territory of Arizona, U. S. A., containing 100,000 acres more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by said heirs conveyed to the party of the first part by deed dated on the first day of May, A. D. 1864. The said tract of land being known as location number 3 of the Baca series."

According to section 7 of the Bill, and the evidence, the 1866 tract alone was *known as* Baca Location No. 3 in 1870. That tract lies entirely within the Santa Rita mountains and the 1863 tract only abuts thereon. Both tracts answer the references to the grant and the title deed, as heretofore explained. It is, therefore,

apparent that even after omitting the description by metes and bounds the Hawley deed covers only the 1866 tract.

Internal Evidences of Intention

There is very striking internal evidence in the Hawley deed that it was intended to pass nothing but the 1866 tract:

1. It was a quitclaim deed, *without any word of sale,* and in sharp contrast to the full covenant warranty deeds from the Baca heirs to Judge Watts. Its quitclaim form implied a mutual recognition that a complete legal title to the tract specifically described was not then in the grantor, as the grant of the 1866 tract was subject to an unfulfilled condition precedent.
2. Mention was made of the Santa Rita Mts. as the locality to indicate unmistakably that the particular land of the 1866 tract was sought and to make a definite description for that tract, which, as selected (P. R. 176), began with reference to an *unlocated building.*
3. The careful separation of the recitals of grant and title conveyance from the statement of the name of the tract indicates a studied desire to avoid giving the impression that the 1866 tract was in fact location No. 3 of the Baca series or was known as such in the deed to Judge Watts.
4. The exact order of courses and exact description

of the 1866 tract were used; and carefully worded and separated references were made to the grant from the United States, the deed to the grantor, the present name of the tract, and the location of it in the Santa Rita Mountains.

5. The form, appearance and double acknowledgment indicate careful preparation; there is every reason, therefore, for holding that it was intended to mean just what it appears to mean.
6. There was an unusually competent and experienced grantor. John S. Watts was then a prominent lawyer and had been a delegate to Congress from New Mexico (of which until 1863, Arizona formed a part), a former Justice and later Chief Justice of the Supreme Court of New Mexico. He had had a wide experience in real estate matters and in the preparation of real estate papers (P. R. 303). We must assume, therefore, that Judge Watts knew how to express his intent and that the expression of it in the Hawley deed is correct.

Delay in recording

After Hawley visited the 1866 tract in 1875 and the Surveyor General refused to survey it, nothing whatever was done by Hawley until 1884, when he conveyed to Mr. Robinson in a very guarded instrument (P. R. 208).

The Hawley deed was not recorded until over fifteen years after its execution and not until Mr. Robinson had obtained permission (subsequently overruled) to

select other land in lieu of the 1866 tract, which he had admitted in his petition to the Commissioner was mineral land to which title could not pass from the United States (P. R. 181).

The form of the deed to Mr. Robinson, the recitals in the latter's petition to the Commissioner, and the conduct of Hawley and Robinson in not promptly recording their deeds, show that only the 1866 tract with its conditional title was the known subject of the Hawley deed. When a man believes he has acquired a good title to a tract of 100,000 acres of land, he promptly records his deed.

Construction by possession

The witness Magee took charge and possession of the 1866 tract for a mining company which claimed to own it. From his concurrent relationship to Hawley, there was some association between Hawley and the company. Mr. Magee remained on the tract for fifteen years. He testified he had nothing to do with the 1863 tract.

In 1887, Mr. Bouldin, then closely allied with Mr. Robinson, again took possession of the 1866 tract and had it surveyed and monumented.

The possession taken under the Hawley deed is strong evidence of what it was supposed and intended to convey.

Reasons for Choice of 1866 Tract

There are three reasons why Hawley in the exercise of good business judgment desired only the 1866 tract:

1. It is located in a mountainous mineral region and could be readily marketed; while the 1863 location was mostly desert land and unsaleable.
2. The mineral products of the 1866 tract would justify the expense of taking them to market. The lack of railroad transportation and the hostility of the Apache Indians made the 1863 tract commercially valueless.
3. A claim for the conflicting Tumacacori and Calabasas grant had been filed with the Surveyor General of Arizona on June 9, 1864 (*Astiazaran v. Mining Co.,* 148 U. S. 80, 81), covering the entire amount of agricultural land in the 1863 tract, as well as the chief water supply and a large amount of the grazing land; and the Mexican claimant was in actual possession (P. R. 245). There was also the conflicting Sonoita grant which controlled the only other water supply. In the arid regions of the Southwest, land without a water supply was then valueless.

Construction of Description

Considered as a whole the Hawley deed passed and was plainly intended to pass only the 1866 tract.

There was no conveyance of location No. 3 as such, or wherever or finally located, but only of a specific tract then actually and expressly stated to be "known as" Location No. 3 and being one of two tracts of that name.

There was every opportunity to insert the description of the 1863 tract if that also was to be conveyed. The recited papers constructively put the grantee on notice

and inquiry, and there is every reason to suppose from the size of the transaction that there was in fact a careful examination of title before the conveyance.

As the specific description described a tract in which the grantor had or was supposed to have an interest, the Court cannot disregard it. Certainly we cannot assume that the grantor intended to convey another tract in the same locality, even if we assume that he believed he owned the 1866 tract and not the 1863 tract (*Russell v. Trustees,* 1 Wheat. 432, 436, 437).

If there be a conflict between the metes and bounds and the rest of the description, then the metes and bounds control, beginning as they do from a well established beginning point, and the utmost that passed of the 1863 tract was the overlap between the two tracts.

Considered as an assignment of the grantor's conditioned rights in the 1866 tract as a location, the deed became inoperative on the Secretary's decision of July 25, 1899 against the validity of that location (29 L. D. 44).

Construction by the parties

1. Hawley's power of attorney, executed about the time of the deed to him, authorized the sale only of his right, title and interest in the land conveyed to him. This shows his recognition that he had only an uncertain title to the land quitclaimed to him by John S. Watts (P. R. 207).
2. In the deed of May 5, 1884 from Hawley to Robinson, the conveyance is of right, title and interest,

"whatever the same may be," showing that the grantor was afraid to use merely the ordinary words of quitclaim for fear of implying that he actually had something to convey.

3. Hawley and his grantees consistently until 1899 used the metes and bounds description of the 1866 tract,merely stating that it was "known as" Baca Location No. 3, and repeatedly asked for a survey thereof.
4. In the Robinson-Bouldin partition of November 1892, the 1866 tract is specifically described and specific portions thereof are selected by each party, showing not only that it was the particular tract of land in the minds of the parties, but that they knew sufficient about it to select specific parts thereof in the partition.
5. In the quitclaim deed from Ireland and King to Mr. Mathews of February 7, 1894 (P. R. 219), the grantors released their interest in the southerly half of the 1866 tract by metes and bounds. Under the instrument then recorded, executed in favor of Ireland and King by Bouldin (P. R. 272), they had a contingent interest in the 1863 tract. If Mr. Mathews then claimed any title to the 1863 tract, why did he take a quitclaim deed from Ireland and King only for the southerly half of the 1866 tract?
6. If Mr. Mathews claimed any interest in the 1863 tract, would he not have inserted in the confirmatory Bouldin deed of February 7, 1894 (P. R. 229) a quitclaim of whatever rights the Bouldins

had therein under the paper executed in behalf of the Watts heirs to David W. Bouldin on September 30, 1884 (P. R. 272), especially as Mr. Mathews in 1893 secured quite a number of quit-claim deeds?

7. In 1901, Alex. F. Mathews, for whose estate the plaintiffs are admittedly, in part at least, trustees, applied to the Department of the Interior, in a petition signed by him and by the son of Samuel A. M. Syme as his attorney, for a review of the decision of 1899 which set aside the amended location, and stated that:

> *The amended location from 1866 to 1899 "was understood to be Baca Float No. 3 * * * the land as described in the amended description * * * passed from grantee to grantee for large considerations as Baca Float No. 3, and there was no thought or question that any other portion of the earth was Baca Float No. 3 in law or in fact;"* and there was no reason to justify the Government "in taking from the grant claimants *the land it had permitted them to buy* without question and place them on land which is claimed by others in large part, a portion being by those to whom the Government has itself given patents" (P. R. 396).

This petition was filed two years after the rejection by the United States Supreme Court of the Tumacacori and Calabasas claim (*Faxon v. U. S.*, 171 U. S. 244), and of the greater part of the Sonoita claim (*Ely v. U. S.*, 171 U. S. 220). The

admission by Mr. Mathews against his interest during his ownership, is admissible in evidence herein against the plaintiffs, who claim under him (*Baker v. Humphrey,* 101 U. S. 494, 499; *Gaines v. Relf,* 12 How. 472, 531; *Rush v. French,* 1 Ariz. 99, 143; 25 Pac. 816; *Costello v. Graham,* 9 Ariz. 257, 263; 80 Pac. 336; *Wigmore on Evidence,* Sec. 1080; 16 *Cyc.* 986b).

8. Not only did Hawley and his grantees claim nothing but the 1866 tract until after 1899, but Judge Watts and his family continued to claim the original tract as pointed out in the statement of the case.

9. Plaintiffs' predecessors in interest, all able and prominent men, for over thirty years repeatedly asked either for a survey to demonstrate that the notoriously mineral 1866 tract was in fact non-mineral, or for the privilege of selecting some other land in lieu of it, on their admission that it was in fact mineral land. Would they have done so, if they in fact believed they had any title to the valid 1863 tract?

Remedy for Wrong Description

Where by mistake the wrong description is inserted in a deed, the grantee's only remedy is an action for reformation; in such an action he can succeed only on proof of a mutual mistake of fact. Furthermore, he must ask for reformation as soon as he discovers the mistake; and he must proceed diligently and adhere to the claim

of mistake (*Shappiro v. Goldberg,* 192 U. S. 232, 242; *Pence v. Langdon,* 99 U. S. 578, 582).

Hawley never complained about his deed. He was on the property in 1875, and unquestionably was familiar with the legal status of both tracts as well as with their geography.

Mistaken Purchase

If Hawley purchased the 1866 tract in the hope or under the supposition that it eventually would be "location No. 3 of the Baca series," he took only the 1866 tract under the deed; and no court can reform both his deed and his bargain. Mistakes in judgment are not compensated by giving a grantee what he should have bought or transferring his deed to other land of the grantor.

Conclusion

The United States Supreme Court, in an early case (*Russell v. Trustees,* 1 Wheat. 432) *refused even to reform a deed for a grantee whose difficulties were similar to those of Messrs. Watts, Davis and the Bouldins,* and said:

> "Where A conveys to B by metes and bounds, the circumstances ought to be very strong to prove that he meant to convey any other lands than those specifically described, before this Court would be in-

duced to set aside one deed, and decree the execution of another. * * *

"If a person supposing himself possessed of a specific tract of land in a certain neighborhood, should contract for the sale of that land to another, it does by no means follow that he would have sold him any other tract, in the same vicinity, to which, without his knowledge, he was then entitled, much less that he would have sold it for the same price. * * *

"When an individual supposing his warrant located on Black Acre, when it is in fact, located on White Acre, conveys the former by metes and bounds, it must be a strong case that will sanction a Court in setting aside the conveyance of the one, and decreeing that of the other. * * *

"In this case the Court explicity avows that it has been not a little disposed to look unfavorably on a claim of such great antiquity. Nearly forty years have elapsed since McKee conveyed this land to Ross. Almost every party and almost every witness must be no more; and to undertake at this late date to inquire into the intention of the parties in a transaction so very remote in time, might be attended with difficulties and evils which cannot now be foreseen."

A fortiori, the metes and bounds will prevail, where no reformation is sought and the Court is asked, after a delay of over forty-five years, simply to quiet a title by remodeling a uniform system of conveyancing which for thirty years was uniformly used and deemed correct.

INSTRUMENT OF SEPTEMBER 30, 1884

The facts with reference to that document are set out herein in our Statement of the Case, pages 10 to 12.

The trial court excluded the document from evidence but it appears in full in the record (P. R. 272). Under the decree, it is removed as a cloud on title.

Status of Parties

Only the defendant Joseph E. Wise is in a position to assert that the instrument is an absolute conveyance, and he must first prove the validity of his title through the Sheriff's sale of the interest of David W. Bouldin or of his administrator.

The defendants Bouldin filed a carefully limited notice of appeal and did not appeal from the fourth and fifth sections of the decree which bar them from asserting title under the instrument of September 30, 1884, and remove it as a cloud on title. Even in their answer, the Bouldins asked only for the north half of the 1863 tract under the Robinson-Bouldin partitions; and their assignments of error follow their notice of appeal and show that they can rely only on their title through Hawley.

Unless, therefore, this Court finds that Joseph E. Wise has whatever title (if any) passed to David W. Bouldin under the disputed instrument, it must stand removed as a cloud on title, and the defendants Bouldin and Joseph E. Wise barred from asserting any title thereunder. In that event, the question as to whether the in-

strument is an executory contract or an absolute conveyance will be only academic.

Record Complete

The defendant Joseph E. Wise presented his full case (including the deposition of John Watts and the record of the disputed instrument) before we put in our case and before the trial court ruled on the Hawley deed.

The solicitor for the Bouldin defendants expressed his absolute concurrence with the ruling on the Hawley deed and suggested that the plaintiffs' objections to the disputed instrument be sustained (P. R. 419). The exception taken by the Bouldins to its rejection from evidence, "out of an abundance of caution" (P. R. 419), is therefore a nullity, especially in view of their limited notice of appeal and assignments of error, and the prayer of their answer. The Bouldins proved their title instruments then rested their case.

No evidence of performance was offered either by the Bouldins or the defendant Wise. There was in fact no performance of the contract but a complete abandonment of it less than a year after it was executed.

We excepted to the rejection of the instrument only because of the reasons for the rejection, and because our objections to the instrument were not sustained. We do not assign as error the removal of the instrument as a cloud.

Form of Instrument

From the cases hereafter cited, the Court will note that in the Southwest and in Pennsylvania, an instrument with the phraseology of a conveyance has often been used with the intent that it shall operate upon or if certain covenants are performed. Such instruments, in the form of future or conditional conveyances, are apparently in common use in those localities; and the Courts have uniformly construed them to be executory contracts on their face.

Every consideration of the disputed instrument at bar and of its surrounding circumstances proves that no conveyance *in praesenti* was intended or even understood to have taken place.

Void as a Conveyance

As to location No. 3, the instrument recited that the location had been disapproved, and it was made incumbent upon Mr. Bouldin to secure its approval or to get something from the United States in lieu thereof. The instrument, therefore, required Mr. Bouldin to prosecute a claim against the United States before one of its departments or in one of its courts.

Under section 3477 of the United States Revised Statutes, the instrument (if a conveyance) and the power of attorney therein contained are "absolutely null and void," even between the parties, especially as it was not acknowledged as required by the section and there was

no certificate of acknowledgment in the form provided thereby.

National Bank of Commerce v. Downey, 218 U. S. 345;
Ball v. Halsell, 161 U. S. 72;
Nutt v. Knut, 200 U. S. 12.

The section expresses a public policy and has been given a very wide application. Claims against the United States are either for money or for property; and the section expresses a salutary public policy as to all such claims.

No Authority in John Watts to execute Conveyance.

The instrument was executed by John Watts individually and as attorney in fact for his mother, Elizabeth A. Watts, his brother, J. Howe Watts, and his three sisters. There is no recital of any power of attorney in the instrument itself.

In 1884, the Arizona statute (*Ariz. Comp L.* 1864-1871, Ch. 42, Sec. 27) required that every power of attorney to execute conveyances must be in writing, signed *and acknowledged* by the donor of the power.

The testimony of John Watts taken on deposition in behalf of the defendant, Joseph E. Wise, conclusively shows that he had no authority to make any *conveyance* to Mr. Bouldin (P. R. 301); that he never told his mother, brother or sisters that he had made an absolute conveyance (P. R. 304); and he could not recall

whether or not the powers of attorney were acknowledged (P. R. 287, 302).

No power can be presumed from the fact that the Bouldin paper is an ancient document, as there has been no possession or act of ownership thereunder and the body of the instrument contains no recital of authority.

The parties claiming under Mr. Bouldin did not attempt to rely on any presumption but took testimony in an attempt to prove authority; that testimony affirmatively shows a lack of authority to execute a conveyance and rebutted any possible presumption to the contrary. When a party negatives a possible presumption in his favor, he is bound by the testimony and cannot rely upon the presumption. A presumption supplies a lack of evidence; it does not disprove a party's own evidence.

Consequently the instrument (if a conveyance) passed only two-thirds of the one-tenth interest of John Watts, and not the community half of his mother or the four-tenths of his brother and three sisters. The statement that the grantors were not to be responsible for a failure of title covers the manner of execution.

Erroneous Rulings on Evidence

Our tenth assignment of error relates to the exclusion of the testimony of John Watts that neither he nor the other heirs received any money from Mr. Bouldin for signing the instrument (P. R. 298). This testimony was competent as it did not tend to vary the instrument, which recited a nominal dollar as the money considera-

tion, the formality used where no actual money consideration passes (*Bales v. Bales Chapel,* 101 S. W. 150; 124 Mo. App. 122). The rejected testimony also showed what the actual consideration was, namely, the performance of covenants by Mr. Bouldin (P. R. 307).

Our eleventh assignment of error relates to the exclusion of the testimony of John Watts that neither he nor Mr. Bouldin ever regarded or referred to the instrument in any way except as a contract or agreement (P. R. 305, 308). Proof of contemporaneous construction is always admissible in the construction of an ambiguous instrument. The instrument is certainly ambiguous, as it combines parts of a conveyance, contract and power of attorney.

Our twelfth assignment of error relates to the exclusion of the letter written to John Watts by Mr. Bouldin on November 25, 1884, referring to the instrument as an agreement, and identified by Mr. Watts as to subject matter (P. R. 415, 301). This was admissible as a declaration against interest, binding on Mr. Bouldin's successors (see cases cited on page 75 herein) and also to show the contemporaneous construction.

In practically all of the cases cited on pages 84 and 85, testimony similar to that excluded herein was received and considered.

All of the excluded evidence was received by the trial Court under the Forty-sixth Equity Rule and is in the record. This Court may, therefore, consider it and do full justice, without ordering a new trial.

Rule of Construction

Irrespective of any words of present conveyance in the instrument, it is to be construed as an executory contract, if on consideration of the paper as a whole it is apparent that an executory contract was intended.

Williams v. Paine, 169 U. S. 55, 76;
Chavez v. Bergere, 231 U. S. 482, 487, aff'g 93 Pac. 762, 14 N. M. 352;
Taylor v. Burns, 203 U. S. 120, aff'g 8 Ariz. 463, 76 Pac. 623;
O'Brien v. Miller, 168 U. S. 287, 297;
Interurban Land Co. v. Crawford, 183 Fed. 630;
17 *A. & E. Ency. Law* (2nd Ed.) p. 5;
Foster v. Foster, 83 Eng. F. R. 294; 1 Levinz 55; K. B. Div. Charles II;
Chapman v. Glassel, 48 Am. Dec. 41 and note; 13 Ala. 50;
Jackson v. Meyers, 3 Johns. 387; Kent Ch. J.;
Jackson v. Moncrief, 5 Wend. 26;
Atwood v. Cobb, 16 Pick. (Mass.) 227; 26 Am. Dec. 657; Shaw, C. J.;
Dreisbach v. Serfass, 126 Pa. 32; 17 Atl. 513; 3 L. R. A. 836;
Phillips v. Swank, 120 Pa. 76; 13 Atl. 712; 6 Am. St. Rep. 691;
Maus v. Montgomery, 11 S. & R. (Pa.) 329;
Williams v. Bentley, 27 Pa. 294;
Stewarts Admrs. v. Long, 37 Pa. 201; 78 Am. Dec. 414;

Ogden v. Brown, 33 Pa. 247;
Kenwick v. Smick, 7 W. & S. (Pa.) 41;
Mineral Dev. Co. v. James, 97 Va. 403, 413; 34 S. E. 37;
Sayward v. Gardner, 31 Pac. 761; 5 Wash. 247;
Ellis v. Jeans, 7 Calif. 409;
Dunnaway v. Day, 63 S. W. 731; 163 Mo. 415;
Powell v. Hunter, 102 S. W. 1020; 204 Mo. 393; re-aff'd in 165 S. W. 1009;
Warne v. Sorge, 167 S. W. 967; Mo.;
Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510;
Cooper v. Mayfield, 57 S. W. 48; aff'd 58 S. W. 827; 94 Tex. 107;
Taylor v. Taul, 32 S. W. 866; 88 Tex. 665;
Wallace v. Wilcox, 27 Tex. 60;
Peterson v. McCauley, 25 S. W. 826; Texas;
Kelly v. Dooling, 23 Ark. 582.

This is the invariable rule where the instrument expressly contemplates a future conveyance. It is also the rule even where a future conveyance is not expressly contracted for; in many of the above cases, there was no mention made of a future conveyance.

Most of the cases were ejectment, partition, or other title actions. They demonstrate that when an instrument with the phraseology of a conveyance is declared to be an executory contract, the decision is given as a matter of judicial construction, and not because of any reformation.

Particular Cases

The cases cited are unvarying in their expression of the rule. Space will not permit discussing any of them; but we particularly call the attention of the Court to the following cases, because of similarities with the instrument at bar.

Charez v. Bergere, 231 U. S. 482, aff'g 14 N. M. 352, 93 Pac. 762;

Taylor v. Burns, 203 U. S. 120, aff'g 8 Ariz. 463, 76 Pac. 623;

Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510;

Cooper v. Mayfield, 57 S. W. 48; aff'd in 58 S. W. 827; 94 Tex. 107;

Taylor v. Taul, 32 S. W. 866; 88 Tex. 665;

Dunnaway v. Day, 63 S. W. 731; 163 Mo. 415;

Mineral Dev. Co. v. James, 34 S. E. 37; 97 Va. 403;

Dreisbach v. Serfass, 17 Atl. 513; 126 Pa. 32; 3 L. R. A. 836;

Williams v. Bentley, 27 Pa. 294;

Stewarts Admrs. v. Lang, 37 Pa. 201; 78 Am. Dec. 414;

Ogden v. Brown, 33 Pa. 247, cited with approval in 169 U. S. 55, 76;

Wallace v. Wilcox, 27 Tex. 60.

Analysis of Cases

From the foregoing cases it will be seen that even though an instrument contains all the apt words of a

formal conveyance *in praesenti,* still if from an inspection of it as a whole it appears that:

(a) It was made in consideration of the performance of certain covenants by the purchaser; or
(b) A further conveyance was expressly or impliedly contemplated; or
(c) The subject matter of the instrument depended upon the successful efforts of the purchaser; or
(d) From the addition of a power of attorney, it is manifest that the words of conveyance were used to effectuate the power; or
(e) If the instrument was executed as an executory contract,

then in any of such contingencies the instrument is to be considered an executory contract.

In the case at bar, we have every enumerated factor which has been adjudicated as sufficient in itself to overcome words of present conveyance.

Analysis of Instrument

A consideration of the various elements in the paper at bar which are not found in a conveyance will demonstrate beyond a doubt that only a contingent retainer contract was intended, or just what John Watts, a disinterested witness, *when called as a witness in behalf of Mr. Wise,* declared was the purpose and mutual understanding of the paper and the object of the negotiations.

Signature by Both Parties

The fact that an instrument was signed by both parties has often been held an important factor in construing it as an executory contract, instead of a conveyance.

Chavez v. Bergere, 231 U. S., 482, 487; aff'g. *De Bergere v. Chavez,* 93 Pac. 762, 764; 14 N. M. 352;

Brewton v. Watson, 67 Ala., 121, 125;

Atwood v. Cobb, 16 Pick. (Mass.) 227, 229, 230, 26 Am. Dec. 657;

Mineral Dev. Co. v. James, 34 S. E. 37; 97 Va. 463;

Dreisbach v. Serfass, 17 Atl. 513; 3 LRA 836; 126 Pa. 32;

See *Powell v. Hunter,* 102 S. W., 1020; 204 Mo. 393; re-aff'd in 165 S. W. 1009.

The instrument at bar was signed by or in behalf of both parties thereto, thus showing clearly that John Watts wished to have no doubt that Mr. Bouldin was bound to perform his agreement. The parties clearly treated the paper as a bilateral contract.

Absence of acknowledgment

In many cases, the absence of an acknowledgment has been considered a determinative factor in construing an ambiguous instrument to be an executory contract, instead of a conveyance.

Chavez v. Beregere, 231 U. S. 482; aff'g;
De Bergere v. Chavez, 14 N. M. 352; 93 Pac. 762;
Lipscomb v. Fuqua, 121 S. W. 193, 194; 55 Tex. C. A. 535 aff'd in 131 S. W. 1061;
Stewart's Admrs. v. Lang, 37 Pa. 201, 205; 78 Am. Dec. 414;
Mineral Dev. Co. v. James, 34 S. E. 37, 97 Va. 403;
Dreisbach v. Serfass, 17 Atl. 513; 3 LRA 836, 126 Pa. 32.

In spite of the fact that Mr. Bouldin in 1878 had secured deeds or executory contracts from alleged Baca heirs, and had been very careful to have such papers duly acknowledged, the instrument of September 30, 1884, was not acknowledged by either party, although executed in El Paso or Santa Fe where it could readily have been acknowledged. Every other Bouldin paper in this record was carefully acknowledged.

Mr. Bouldin came to Mr. Watts recommended as a good business man. Everybody knows that a deed or mortgage of real property must be acknowledged in order to be recorded and must be recorded for the protection of the grantee. It is also a matter of common knowledge that executory contracts for the conveyance of real property need not be acknowledged.

Under the circumstances, the failure to have the paper acknowledged shows that the parties understood it to be an instrument which did not require acknowledgment.

Situation of parties

It is elementary that the situation of the parties at the time of the execution of the paper may be shown to aid in the construction of an ambiguous instrument, such as that under discussion.

> *Warne v. Sorge,* 167 S. W. 967, 968; Mo.;
> *Kearick v. Smick,* 7 W. & S. (Pa.) 41, 45;
> *Phillips v. Swank,* 120 Pa. 76, 13 Atl. 712; 6 Am. St. Rep. 691.

The best way to ascertain the intent of the parties in the circumstances under which the instrument was executed is to put ourselves in their situation at the time. They contemplated that something might be made out of a chaotic situation; but the extent and ultimate form of the success of Mr. Bouldin's efforts were entirely speculative. The recitals which are binding herein (*Devlin on Deeds,* 3rd Ed., Secs. 992, 997), show what the situation was understood to be. Mr. Bouldin came to John Watts seeking employment on a contingent retainer contract. As he was a stranger to Mr. Watts, he certainly would not be royally rewarded in advance for a mere promise to do certain things.

Is it possible to suppose that the Watts heirs, for one dollar and a mere premise, would convey absolutely to a stranger a two-thirds interest in three tracts containing in the aggregate 330,000 acres of land? The size of the transaction is in itself conclusive evidence that the words of conveyance were to operate only on the performance of the obligations assumed by Mr. Bouldin,

especially as their *performance* was expressly stated as the consideration and inducement for the paper.

Shall we assume the parties contemplated or expected that in case Mr. Bouldin died immediately after the delivery of the paper, his heirs would be vested with a two-thirds interest in three Baca Floats, and the Watts estate as to its one-third interest left in the same chaotic state in which it was, or was supposed to be, immediately before the delivery of the paper?

Uncertainty of Subject Matter

The uncertainty of the subject matter over which an instrument is to operate has been held sufficient to denominate it an executory contract and not a conveyance.

Tayler v. Taul, 32 S. W. 866; 88 Tex. 665;
Hazlett v. Harwood, 16 S. W. 310: 80 Tex. 510.

By reference to the paper it will be seen that as regards Baca Float No. 3, the parties were uncertain as to which of the following things would be embraced in the contemplated division of the result of Mr. Bouldin's labor and expenditures:

1. Baca Float No. 3,
2. The Las Vegas grant,
3. Cash by reason of any sale by Judge Watts,
4. Property by reason of any transacton had by Judge Watts,
5. Indemnity lands from the United States,
6. Land certificates from the United States.

As Baca Float No. 3 was not believed to have any present valid existence, with only a contingent possibility that its validity could be established by Mr. Bouldin or something received therefor, the parties certainly did not intend to make any present conveyance of a subject matter which had only a future potential existence. The very purpose of the paper was to bind Mr. Bouldin to bring something into actual existence for the Watts heirs. Certainly there was no reason why they should give him his full compensation before he succeeded in his efforts, especially as the medium of payment had not then been ascertained.

Executory Consideration

The non-payment of consideration, or the fact that the consideration was executory, has repeatedly been held to be a persuasive factor in determining that no absolute conveyance was made.

Taylor v. Burns, 203 U. S. 120, 125; affirming 8 Ariz. 463, 76 Pac. 623;

Wallace v. Wilcox, 27 Tex. 60, 67;

Cooper v. Mayfield, 57 S. W. 50; aff'd in 58 S. W. 827, 94 Tex. 107;

Hazlett v. Harwood, 16 S. W. 310, 311; 80 Tex. 827;

Taylor v. Taul, 32 S. W. 866; 88 Tex. 665;

Ellis v. Jeans, 7 Cal. 409, 414;

Dreisbach v. Serfass, 126 Pa. 32, 40; 17 Atl. 513; 3 LRA 836;

Stewart's Admrs. v. Lang, 37 Pa. 201, 204; 78 Am. Dec. 414;

Ogden v. Brown, 33 Pa. 247, 249, 250;
Kelly v. Dooling, 23 Ark. 582.

A receipted consideration of One Dollar was expressed in the following cases of executory contracts with words of present conveyance:

Taylor v. Burns, 203 U. S. 120 aff'g 8 Ariz. 463; 76 Pac., 623;
Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510;
Dreisbach v. Serfass, 17 Atl. 513; 126 Pa. 32; 3 LRA, 836;
Dunnaway v. Day, 63 S. W. 731; 163 Mo. 415.

Even where the entire consideration had been paid, instruments with words of conveyance have been held to be executory contracts.

Chavez v. Bergere, 231 U. S. 482; aff'g 14 N. M. 352, 93 Pac. 762;
Sayward v. Gardner, 31 Pac. 761; 5 Wash. 247;
Paterson v. McCauley, 25 S. W. 826; Tex. C. A.;
Chapman v. Glassell, 13 Ala. 50; 48 Am. Dec. 41.

In many other cases heretofore cited, there had been a part payment of consideration.

In the paper at bar, there was no recognition of past services or past expenditures, nor were there any past

services or past expenditures by Mr. Bouldin for the Watts heirs. Everything that Mr. Bouldin was to do or to spend was *in futuro.* The form and even the existence of the subject matter of the instrument depended upon the successful result of his efforts or negotiations. Every expressed consideration for the paper, except the formality of a dollar (*Bales v. Bales Chapel,* 101 S. W. 150; 124 Mo. App. 122), was expressly stated to be the *performance* of Bouldin's agreement as to what he should do thereafter. The statement as to a mutual compromise expressed a prospective purpose and not a consummated intent, as there was no conveyance by Mr. Bouldin and the compromise was not to take effect until "the final and complete settlement of the title and all matters connected therewith."

As the entire consideration was executory, and as even the existence of a subject matter for the paper was not only uncertain, but expressly contingent upon the successful result of Mr. Bouldin's efforts, and inasmuch as the paper was executed as executory contracts are executed, with the signature of both parties and the acknowledgment of neither, the logical conclusion is that the words of conveyance in the paper are executory and as much *in futuro* as the consideration for the paper and the subject matter over which it might operate.

Performance as a Condition

When an agreement is made in consideration of the performance of the promises of one of the parties, such performance is a condition precedent to any performance

by the other party.

Telfener v. Russ, 162 U. S. 170, 179, 180;
9 *Cyc.* 643 to 646;
Stewart's Admrs. v. Lang, 37 Pa. 201, 204; 78 Am. Dec. 414;
Dreisbach v. Serfass, 126 Pa. 32; 17 Atl. 513; 3 LRA 836;
Taylor v. Taul, 32 S. W. 866; 88 Tex. 665.

The only consideration for the paper was the performance by Mr. Bouldin of his covenants to clear up the title and secure something for the Watts heirs. The deposition of John Watts proves this and the paper itself corroborates him.

As performance by Mr. Bouldin was a condition precedent, the words of conveyance were conditional, and were not to operate unless or until Mr. Bouldin performed his covenants.

Consequently the paper must be deemed executory, and to quote Chief Justice Shaw, the words of conveyance "must be construed to mean 'have agreed and contracted to convey.'" (*Atwood v. Cobb,* 16 Pick. Mass. 227, 229, 230; 26 Am. Dec. 657.)

Power to take possession

A provision allowing possession has been deemed of great importance in construing an ambiguous instrument to be an executory contract instead of a conveyance.

Chavez v. Beregere, 231 U. S. 482, 486, 487; aff'g *de Bergere v. Chavez,* 14 N. M. 352, 93 Pac. 762;

Morse v. Salisbury, 48 N. Y. 636, 644, 645, 650.

The paper was carefully prepared and gave to Mr. Bouldin the right to take possession of the land. If the paper had been considered an absolute conveyance of a two-thirds interest, such a provision would not have been inserted, as any holder of an undivided interest has the right to take full possession of the whole property.

Furthermore, the possession was to be as agent or attorney for the Watts heirs, not only as to Baca Float No. 3, but also as to "any lands or land certificates granted in lieu thereof." As Mr. Bouldin would be in possession "of the whole or any part" as agent or attorney for the Watts heirs, he would be estopped from denying their full title thereto.

Conveyance in Aid of Power

The addition of a power of attorney to act *for the Watts heirs* in taking possession of the property, to receive *as their attorney other property in lieu thereof,* and to sell or dispose *as their attorney* of the whole or any part, limits the words of conveyance to the extent necessary to effectuate the power.

Taylor v. Burns, 203 U. S. 120; aff'g 8 Ariz. 463, 76 Pac., 623.

Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510.

Cooper v. Mayfield, 57 S. W. 48; aff'd in 58 S. W. 827, 94 Tex. 107.

Taylor v. Taul, 32 S. W. 866; 88 Tex. 665.

As the United States Supreme Court said in *Taylor v. Barns, supra,* in affirming the decision of the Supreme Court of Arizona, with reference to a similar paper:

> *the words of conveyance can have no more effect on the title than is necessary to accomplish the purpose of the transaction; "the purpose here named was the giving of authority. * * * For this it is not necessary to pass title with authority. And it is not ordinarily to be expected that an owner will part with title before the receipt of purchase price or security therefor."*

No Partition or Settlement

Mr. Bouldin was very careful not to convey any interest in any title which he thought he had acquired from the alleged California heirs of Baca. The paper contemplated a settlement between Mr. Bouldin and the Watts heirs, but only on the future division of the proceeds of Mr. Bouldin 's success.

There can be no present partition without words of mutual conveyance. As the interest of the Watts heirs under the deeds from the alleged California heirs to Mr. Bouldin would only take effect at the time when the Watts heirs "are to have" a net one-third, it follows that Mr. Bouldin received no present interest in the existing title of the Watts heirs, as mutuality is the essence of all partitions.

Nor was there any present settlement between the parties. There was an "accord" as to what would be

received under stipulated conditions, but no attempt by Mr. Bouldin to give present "satisfaction" out of his alleged interest under the two California deeds. It is trite law that even an unconditional accord without satisfaction is a nullity.

Future Division

The provision in the paper that the Watts heirs "are to have" a net one-third of what was secured by Mr. Bouldin shows that a future vesting and division was contemplated.

> *Taylor v. Taul,* 32 S. W. 866, 867, 868; 88 Tex. 665;
>
> *Foster v. Foster,* 83 Eng. Full Reprint 294, 1 Levinz 55; K. B. Div. Charles II; cited with approval in 37 Pa. 201 (78 Am. Dec. 414) and in 33 Pa. 247.

The contemplated future division and the recognition that indemnity land, land certificates, cash or "other property" would pass directly to the Watts heirs both show that a future conveyance by the Watts heirs to Mr. Bouldin was impliedly contemplated, especially as there can be no present conveyance of something which may later come into existence.

> *Cooper v. Mayfield,* 57 S. W. 48, 50; aff'd in 58 S. W. 827, 94 Tex. 107;
>
> *Hazlett v. Harwood,* 16 S. W. 310; 80 Tex. 510.

Even if the future conveyance was not expressly contracted for it is implied by law from the construction

of the agreement that Mr. Bouldin should have a certain share on the performance of his covenants. When an instrument expressly or impliedly contemplates a future conveyance, it is always deemed an executory contract.

The parties did not contemplate that the Watts heirs would have anything until "the final and complete settlement of the titles to said land and all matters connected therewith," and then only what might be "recovered and secured" by Mr. Bouldin, at which time it was stated that the Watts heirs "are to have" a net one-third. Certainly Mr. Bouldin could not get his share until his clients received theirs.

Attorney's Interest Subject to Diminution

Mr. Bouldin's contemplated two-thirds interest was made subject to diminution; he was bound to deliver an absolutely net one-third of the land recovered. The exercise of his power to mortgage might alone exhaust his own entire interest.

He was also bound to compromise with the existing claims of title, not only as to the Tumacacori, Calabasas and Sonoita claims, but also any claims under the Hawley deed, and to overcome the contentions of the Land Department at that time that discovery of mineral on the Float would revest title *pro tanto* in the United States, even if the location had been previously approved; in these compromises certain concessions were expected to be made.

It was understood that the Watts heirs should receive a net one-third of the lands recovered and Mr. Bouldin

the balance, but that out of his two-thirds interest he was to pay all the expense and bear all the adjustments by way of compromise.

The natural consequence of the contentions of our adversaries is that Mr. Bouldin would be in a better position if he broke his contract than if he performed it. The absurdity of such a consequence proves the falsity of the premise on which it is founded.

No Reward Without Effort

In 1884 the Land Department did not recognize the 1863 location as "approved." It was made incumbent upon Mr. Bouldin to secure a recognition of such approval by judicial decree or otherwise. This he made no attempt to do.

If the result in 1914 of litigation over Baca Float No. 3—litigation had long after Mr. Bouldin's death and conducted by adverse parties—is allowed to be read into the paper, it is absolutely void, as a contract impossible of performance. *If there was nothing for Mr. Bouldin to do, he certainly would not receive therefor the rewards for the contemplated efforts and expenditures on his part* (*Hoplett v. Harwood,* 16 S. W. 310; 80 Tex. 510).

Comparsion with Paper from California "Heirs"

In 1878, Mr. Bouldin secured two instruments from alleged heirs of Baca, living in California, and recorded them in Pima County.

The two California papers are alike; but the instrument of September 30, 1884 contains some noteworthy changes, although the general form is quite similar:

1. The California papers recite a consideration of one dollar, "and the further consideration as hereinafter expressed"; while the instrument of September 30, 1884, after giving the nominal consideration of one dollar, is based upon "the further considerations, covenants and agreements *to be performed* by the party of the second part, as hereinafter mentioned." *Performance by Mr. Bouldin was therefore made a distinct inducement and consideration of the paper of September* 30, 1884, *but the California papers were given for the mere promise.*

3. In the paper of September 30, 1884, after a statement of Mr. Bouldin's agreements similar to that in the papers of 1878, the following appears:

> "And upon the final and complete settlement of the titles to said lands, and all matters connected therewith, the parties of the first part are to have, own and possess in fee an undivided one-third of the net land certificates obtained, and an undivided one-third of all moneys and other property recovered and secured by the party of the second part, net".

As the Watts heirs were to have a net one-third interest, and that only "on the final and complete settlement of the titles to said lands, and all matters connected therewith," it follows that Mr. Bouldin could not have been given, *in praesenti,* an

absolute two-thirds interest in the properties, because the natural sequence to the quoted clause is that Mr. Bouldin should have what was left; in other words, the quoted clause was intended to establish in the Watts heirs a primary interest in everything "recovered and secured" by Mr. Bouldin.

4. The California papers were most carefully acknowledged, but the Watts paper was not. The only logical inference is that the paper of September 30, 1884, was mutually deemed an executory or contingent retainer contract, which did not require an acknowledgment.

Summary

Forms of conveyance are so well established and so well known that the slightest deviation therefrom or addition thereto subjects an instrument to judicial construction. In the instrument at bar, the additions to the ordinary form of conveyance are so radical, the size and uncertainty of subject matter so pronounced, the method of execution so unusual, that it is the irresistible conclusion that something radically different from an ordinary conveyance was intended. As the instrument shows that something different from an ordinary conveyance was intended, it follows inevitably that the instrument is not a conveyance.

The primary consideration and condition for the paper was expressly made the performance of Mr. Bouldin's agreements. The Court, in construing the paper, must place itself with the parties at the time of the execution

of the paper. Had the question then arisen as to what would happen in case Mr. Bouldin did not perform his agreements, the inevitable answer from both parties would have been that the instrument at bar would be a nullity. This must be the judicial inference from the form of the paper, the circumstances under which it was executed, and the situation of the parties at the time.

Subsequent Conduct of Mr. Bouldin

The activities of Mr. Bouldin, subsequent to September 30, 1884, with reference to Baca Float No. 3, or any location or attempted relocation thereof, are disclosed by the record as follows:

1. In Mr. Bouldin's letter of November 25, 1884, to John Watts, less than three months after the paper was executed, he states:

   "My being sick has very materially interfered with my business arrangements and has also been the cause of my not sending you the certified copy of our *agreement*. Had I thought it was very material, or that you thought so, I should have taken pains to have it copied, certified and sent to you."

   This letter and its subject matter were identified by Mr. Watts (P. R. 415, 301).
2. In the deed of February 21, 1885, to John Ireland and Wilbur H. King (P. R. 312), Mr. Bouldin conveyed:

"An undivided one-third of one-third of all right, title and interest, *owned and controlled and possessed*"

by him in the location of 1863, or anything received in lieu thereof. It is clear that he did not believe that he had an absolute undivided two-thirds interest in the property, under his contract with John Watts, executed less than five months before. The "right, title and interest" which Mr. Bouldin then thought he "owned" was that under the deeds to him from the California heirs, and what he "controlled and possessed" was his contingent interest under the instrument of September 30, 1884. The statement of the fractional interest conveyed is also most extraordinary.

3. On June 8, 1885, Mr. Bouldin entered into an agreement with Mr. Robinson, by which they mutually agreed to proceed to carry out the provisions of the order of the Commissioner of the General Land Office, dated March 12, 1885, authorizing Mr. Robinson to relocate the grant, and stipulated for an equal division of the benefits thereof.
4. In October, 1887, Mr. Bouldin mortgaged to Rifenburg 12,500 acres by specific description in the northwest corner of the 1866 tract.
5. On October 16, 1888, shortly before his $5,000 note to Messrs. Ireland and Kings became due, Mr. Bouldin and his wife conveyed to their sons, David W. Bouldin, Jr. and Powhatan W. Bouldin, the undi-

vided one-half interest in and to the 1866 tract.

6. On August 23, 1892, shortly before the suit brought against him in Pima County by Messrs. Ireland and King, Mr. Bouldin conveyed unto his sons, Powhatan W. Bouldin and James E. Bouldin, all of his right, title and interest of, in and to the 1866 location.

7. By partition deeds, dated November 12 and 19, 1892, between Mr. Robinson on the one part and Mr. Bouldin, *as attorney in fact for his sons, Powhatan W. Bouldin and James E. Bouldin, and his daughter-in-law, Lucy Bouldin,* on the other part, after reciting other partition deeds, there was conveyed to Mr. Robinson the southerly half of the 1866 tract and to the Bouldins the northerly half of that tract.

8. In Mr. Bouldin's answer, filed May 10, 1893, by Mr. Franklin as his attorney, in the suit brought against him in Pima County by Messrs. Ireland and King, he alleges that his $5,000 note to them was given for the purchase price of an interest in Baca Float No. 3, and that there was a failure of consideration because the payees had no title whatsoever thereto. Messrs. Ireland and King claimed only under the instrument, executed to them by Mr. Bouldin himself on February 21, 1885; and if that passed no title, it was because Mr. Bouldin then had none to convey; and if he then had none to convey, the instrument of September 30, 1884 passed no title. In that same action, Mr. Bouldin's alleged interest in the 1863 location had

been attached by the plaintiffs, prior to the filing of the answer above referred to.

9. The various conveyances by Mr. Bouldin's relatives, after his death, and down to the conveyance by James E. Bouldin to Jennie N. Bouldin of June, 1913, show that they then claimed no interest in the 1863 tract, but only to the northerly half of the 1866 tract, "purchased" by Mr. Bouldin himself from Mr. Robinson. In the deed of June, 1913, James E. Bouldin conveyed "the undivided one-half of the north one-half" of the 1863 location evidently thinking he was conveying his interest therein under the partitions with Robinson.

Such is the written record of Mr. Bouldin's activities, a record made at a time when his acts would be the best evidence of what he believed his rights to be.

Summary of Mr. Bouldin's Acts

The mere summary of Mr. Bouldin's acts is fatal to the contentions of his successors in interest:

1. After the agreement of June 8, 1885, between Mr. Robinson and Mr. Bouldin, the latter paid no attention to the 1863 tract, but confined his activities to the 1866 tract, in which the Watts heirs had no interest whatsoever.
2. In his deeds to his sons, he conveyed only a divided or undivided interest in the 1866 location, and stated that his interest therein was a *full one-half,* which he had acquired *by purchase* for them.

The testimony of John Watts shows that neither he or his family received any money whatsoever from Mr. Bouldin; and, therefore, the "purchase" must have been of the interest which Mr. Bouldin acquired from Mr. Robinson.

3. By omitting any mention of the 1863 tract in any of the deeds to his sons, Mr. Bouldin admitted that he had no interest therein. The evident motive for these deeds was protection against the $5,000 note to Ireland and King; certainly if he thought he had any interest in the 1863 location he would have covered that up also.
4. The record is clear and convincing that after conferences with Mr. Robinson in Washington, culminating in their written agreement executed there on June 8, 1885, Mr. Bouldin became convinced that it was to his interest to abandon and repudiate his contract of September 30, 1884 with John Watts, and work with Mr. Robinson. It is very evident that while in Washington Mr. Bouldin became discouraged as to any future for the 1863 location, with conflicting Mexican grants clouding its title, and covering its entire agricultural land and water supply. Association with the Robinson title afforded more opportunities for his peculiar talents.
5. There is not the slightest evidence that Mr. Bouldin ever made any attempt to secure the recognition of the 1863 location. He did nothing in the Land Department or elsewhere to accomplish that end.

Abandonment of Contract.

We believe the foregoing summary is absolutely convincing that Mr. Bouldin from June, 1885, to the date of his death, did nothing for the Watts heirs; and not only abandoned their retainer, but repudiated his agreement with them, by associating himself with a hostile interest. After June, 1885, in his various recorded papers, he did not deem his contingent interest in the 1863 tract even worth mentioning, nor did he have any known transaction therewith.

The financial difficulties of Mr. Bouldin with Messrs. Ireland and King, culminating in their judgment against his administrator in Pima County, show that he abandoned also his agreement with them of February 21, 1885, with reference to the same location, and that in 1888 they had forced him to give them a $5,000 note in settlement.

Transactions not chargeable against us

1. Mr. Bouldin, in his transaction with Messrs. Ireland and King, and in all his transactions with Mr. Robinson, expressly acted in his own behalf, or in behalf of his sons, and not in behalf of the Watts heirs.
2. In all his transactions, except that with Messrs. Ireland and King, Mr. Bouldin, dealt only with the 1866 tract or some attempted relocation thereof, and not with the 1863 tract.

3. The instrument of September 30, 1884 did not give Mr. Bouldin any power to partition.
4. His transaction with Ireland and King was merely an employment of sub-contractors.

Mr. Bouldin did not act for Watts heirs

It is elementary that an attorney-in-fact must act not only in behalf of his principals, but also in their names.

Clarke v. Courtney, 5 Pet. 319
Whitney v. Wyman, 101 U. S. 392
Hunt v. Rousmanier, 8 Wheat. 174

Nowhere in this record is there a single paper executed by Mr. Bouldin in behalf of the Watts heirs, nor one that was even supposed to be for their benefit.

In his partitions with Mr. Robinson, Mr. Bouldin clearly and emphatically stated that he was acting as attorney-in-fact for his sons; and in his conveyances to his sons, Mr. Bouldin conveyed the interest in the 1866 location which he had "purchased" for them with their money (P. R. 90). This assertion of an adverse interest, and association with a hostile party, absolutely terminated the agency.

Hill v. Conrad, 43 S. W. 789; 91 Tex. 341;
Colton v. Rand, 51 S. W. 838, 842, 53 S. W. 343; 93 Tex. 7;
Case v. Jennings, 17 Tex. 661, 672, 673;
In re Watkins, 53 Pac. 702; 121 Cal. 327.

Certainly the acts of an agent, done not in the name of the principal, but in the name and behalf of another, are of no avail against the principal.

Burden of Proof to Show Performance

Treating the Bouldin paper as an executory or contingent retainer contract, it is clearly incumbent upon those who claim under Mr. Bouldin to show that he performed his part of the contract.

Hazlett v. Harwood, 16 S. W. 310, 311; 80 Te 510
Taylor v. Taul, 32 S. W. 866, 867; 88 Tex. 665
Dreisbach v. Serfass, 126 Pa. 32, 40, 41; 17 Atl. 513; 3 L. R. A. 836
Williams v. Bentley, 27 Pa. 294
Dunnaway v. Day, 63 S. W. 731, 734; 163 Mo. 415

Recording Conferred No Benefit

Of course the mere recording of the Bouldin paper added nothing to its efficacy (*Davis v. Martin,* 8 Pa. Super. Ct. 133, 141). In all or nearly all of the cases heretofore cited, the instrument had been recorded before the litigation.

Essentials to Specific Performance

As Mr. Boudlin's successors must seek the equivalent of specific performance, they must not only show per-

formance, but meet the requirements which a court of equity deems essential to the granting of such a decree, instead of relegating them to their remedy at law (*Williams v. Bentley,* 27 Pa. 294, 300; *Dreisbach v. Serfass,* 126 Pa. 32, 41; 17 Atl. 513, 3 LRA. 836).

Under well-known equitable rules, specific performance is never awarded if the applicant therefor has been guilty of overreaching (36 Cyc. 615); or if the contract is unfair (36 Cyc. 612); or if the applicant has been guilty of laches (36 Cyc. 721 to 724), especially where there has been a great enhancement of value in the meantime (36 Cyc. 726; *Patterson v. Hewitt,* 195 U. S. 309); or if third parties have succeeded in doing what the ancestor of the applicants agreed to do (36 Cyc. 619, 725).

Instrument Revoked by Deaths

It is elementary that where a contract requires a man's personal services or gives him any discretionary power, it ceases to operate on his death.

We have the right to choose the recipients of our confidence. No matter how able and trustworthy a man's legal representative may be, they have no right to perform a contract made with their decedent, in so far as it looked to his personal services or his discretionary judgment.

Power Not Coupled With Interest

A power coupled with an interest is one that exists in the subject matter of the power, and not merely in what is produced by the exercise of the power. As Mr.

Bouldin's interest existed only in the proceeds arising from an execution of the power, it was not a power coupled with an interest. An interest in the proceeds by way of compensation is not such an interest as renders the power irrevocable or "coupled with an interest."

Hunt v. Rousmanier, 8 Wheat. 174, 204
Taylor v. Burns, 203 U. S. 120, 126
Taylor v. Burns, 8 Ariz. 463; 76 Pac. 623
Trickey v. Crowe, 204 U. S. 228, 240
Trickey v. Crowe, 8 Ariz. 176

Power Long Since Terminated

Even if the power was for a consideration made irrevocable, it did not survive the death in 1893 of Mrs. John S. Watts, one of the joint principals.

Hunt v. Rousmanier, 8 Wheat. 174, 207
Long v. Thayer, 150 U. S. 520, 522
Galt v. Galloway, 4 Pet. 332, 344
Trickey v. Crowe, 204 U. S. 228, 240
Green v. Tuttle, 5 Ariz. 179; 48 Pac. 1009

The power certainly terminated on Mr. Bouldin's death, as it called for his personal services and confided in him a wide discretion.

1 *A. & E. Ency. Law* (2nd Ed.) 1226
Howe S. M. Co. v. Rosensteel, 24 Fed. 583
Bancroft v. Scribner, 72 Fed. 988, 991
Love v. Peel, 95 S. W. 998, 1000; 79 Ark. 366

Bristol S. Bank v. Holley, 58 Atl. 691, 692; 77 Conn. 225

Ryder v. Johnson, 45 So. 181 183; Ala.

Mills v. Union C. L. I. Co., 28 So. 954; 77 Miss. 327; 78 A. S. R. 522

The power undoubtedly terminated on the death of the widow of Judge Watts, because Mr. Bouldin's employment was in a joint contract; and from the nature of his authority, it could not be exercised except in behalf of the entire interest of the Watts heirs, free from any complication because of any creditors of the widow.

The employment certainly terminated on Mr. Bouldin's death; and thereafter no one in his behalf, or in behalf of his successors, had the right to assume to act for the Watts heirs undrer the contract. No one in fact did.

Conclusion

The instrument of September 30, 1884 is nothing but an executory contract. It was never performed by Mr. Bouldin but abandoned by him less than a year after it was executed. More than ten years ago, it was terminated by deaths.

If it is a conveyance, then there is no proof of lawful authority in John Watts to execute the instrument in behalf of his mother, brother and three sisters; and if not entirely void under U. S. R. S. §3477, it is good only for a one-fifteenth interest.

Certainly there is not a vestige of moral right in the contentions of those who claim under Mr. Bouldin.

PRAYER FOR REVERSAL

The decree should be reversed; and a mandate should issue, directing the lower court to enter a decree adjudicating and quieting the title of Santa Cruz Development Company to the entire tract at bar (except in so far as its title to the Alto mining property in the northeast corner was divested by a tax sale in June, 1914), and removing as clouds upon its title all instruments purporting to inure to the benefit of any of the other parties to this action.

New York City, January 19, 1916.

Respectfully submitted,

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